Supreme Court, U. S.
FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1520

HENRY C. FIELD, JR., JAMES G. LITTLE, JOSEPH E. HOKER, ET AL,
Petitioners,

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CA DC

JOSEPH K. TAUSSIG, JR.
#906, 1625 Eye Street, N.W.
Washington, D.C. 20006
Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CONTROVERSIES	9
STATEMENT	9
Regulations DOD 5500.7	9
Purposes of DOD 5500.7 and DD Form 1357	12
A Short History of DOD 5500.7 and DD Form 1357	13
A Short Summary of the *Field* Controversy	14
A Short Summary of the *Little* Controversy	17
A Short Summary of the *Hoker* Controversy	25
WHY THE WRIT SHOULD ISSUE	27
Summary of Arguments	29
The Privacy Act of 1974	33
Proceedings and Decisions in the District Courts	33
Proceedings and Decision of the Circuit Court	39
General Conditions Preceding the Privacy Act of 1974	40
The Legislative History	41
The Contents of the Statute	42
The Opinion of the Circuit Court	43
Jurisdiction	44
The Privacy Act of 1974, Remedies	45
Coercive Self-Incrimination	61

Table of Contents Continued

Page

The District Court Orders 64
The Circuit Court's Opinion 68
Contempt 73
Summary of DD Form 1357 74
37 U.S.C. 801(c) and 18 U.S.C. 281 77
Historical Development 77
Legislative Intent 82
Standing to Sue 82
Substantive Right to Work 88
Attainder 91
Vagueness 93
Discrimination 94
The Eighth Amendment 97

CONCLUSION—"Status" 98

CONCLUSION—"Facts" 100

CASES: Page

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1969) 64, 68, 71
Boyd v. United States, 116 U.S. 616 (1886) 49, 74
California v. Byers, 402 U.S. 424 (1971) 71
Cummings v. Missouri, 71 U.S. 277 (1867) 92
Deveau v. Braisted, 363 U.S. 144 (1960) 89
Eilenbecker v. District Court, 134 U.S. 131 (1890) ... 45, 74
Examining Board v. Otero, 426 U.S. 572 (1976) 89
Ex Parte Garland, 71 U.S. 333 (1867) 92
Hawker v. New York, 170 U.S. 189 (1898) 89
Hayes v. Fisher, 102 U.S. 121 (1880) 45
Hooper v. Hartman, 163 F.Supp. 437 (D.C.Cal.); 247 F.2d 429, (9 Circ. 1960); 161 Ct.Cl. 151 (1964); *cert. den.*, 377 U.S. 977 (1964) 62, 96, 99
Howat v. Kansas, 250 U.S. 181 (1922) 45, 66, 75
Leary v. United States, 395 U.S. 6 (1969) 71
Lefkowitz v. Turley, 414 U.S. 70 (1973) 65
Malloy v. Hogan, 378 U.S. 1 (1964) 65
Marbury v. Madison, 1 Cr. 137 (1803) 30
Marchetti v. United States, 390 U.S. 39 (1968) ... 64, 68, 71
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 89
Morganthau v. Barrett, 71 U.S.App.D.C. 148 (1939) *cert. den.* 309 U.S. 622 (1939) 81, 99
Morris v. Jones, 329 U.S. 545 (1947) 33
O'Callahan v. Parker, 395 U.S. 258 (1968) 100
Puglisi, et al, v. United States, 564 F.2d 403 (Ct.Cl. 1977), *cert. den.* 98 S.Ct. 1606 (1977) 96, 100
Rabinowitz v. Board of Junior College, 507 F.2d 1255, (7 Circ. 1944) 86

Page

Relford v. Commandant, 407 U.S. 355 (1971) 100
Riehl v. Margolies, 279 U.S. 218 (1929) 33
In re Savin, 131 U.S. 267 (1889) 75
Seastrom v. United States, 147 Ct.Cl. 453 (1959) 79
Spevack v. Klein, 385 U.S. 511 (1967) 65
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 86
Taussig v. McNamara, et al, 219 F.Supp. 757 (D.D.C. 1963), aff'd without opinion, No. 18134 (D.D.C. Cir. 1964), cert. den., 370 U.S. 834 (1964) 97
Terrace v. Thompson, 263 U.S. 197 (1923) 88
Ex Parte Terry, 128 U.S. 289 (1888) 66, 75
Truax v. Raich, 239 U.S. 33 (1915) 88
United States v. Carolene Products Co., 304 U.S. 144 (1938) 89
United States v. Gillilan, et al, 288 F.2d 796 (2 Cir. 1961) 77
United States v. Lovette, 328 U.S. 303 (1946) 92
United States v. Shipp, 203 U.S. 563 (1906) 31
United States v. Tyler, 107 U.S. 64 (1883) 99
Ex Parte Wall, 363 U.S. 144 (1960) 89

STATUTES:

Section 113, Criminal Code, 1938 78
5 U.S.C. 59(c) 79
5 U.S.C. 301 18
5 U.S.C. 552 22
5 U.S.C. 552(a) (Appendix B) 2
5 U.S.C. 701 22
5 U.S.C. 5532 51
10 U.S.C. 277 97

Page

10 U.S.C. 802(4) 62
10 U.S.C. 832 62
10 U.S.C. 892 62
10 U.S.C. 907 62
10 U.S.C. 933 51
10 U.S.C. 6112b 79
18 U.S.C. 207 12
18 U.S.C. 281 (Appendix B) 2
18 U.S.C. 283 12
37 U.S.C. 801(c) (Appendix B) 3
44 U.S.C. 3103 18
50 U.S.C. 1436 51
RULES OF THE SUPREME COURT OF THE UNITED STATES
RULE 19(b) 3

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 1 39
Rule 12(a) 32
Rule 23 26
Rule 55 5

REGULATIONS:

Department of Defense Directive 5500.7 10
DD Form 1357 "Statement of Employment (Retired Regular Officers)" 10
DD Form 1787 "Report of DoD Related Employment" 51

MISCELLANEOUS AUTHORITIES:

Reference Guide to Employment Activities of Retired Naval Personnel 15

Page

1974 U.S. Code, Congressional and Administrative News, Pages 6916 to 6998 41

Section 303 (Appendix B) 57

The President's Blue Ribbon Panel on the Department of Defense (1970) 93

Senator William Proxmire, Press Release, January 26, 1976 90

MISCELLANEOUS ADMINISTRATIVE OPINIONS:

38 Com. Gen. 470 (1958) 79

Opinion JAGN, Op JAGN JAG: 134.2: PGH: am, May 16, 1960 81

Opinion JAGN, Op JAGN JAG: 134.1: RWC: sb, July 12, 1960 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

HENRY C. FIELD, JR., JAMES G. LITTLE, JOSEPH E. HOKER, ET AL,
Petitioners,

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Henry C. Field, Jr., James G. Little, and Joseph E. Hoker (representing all retired regular officers of the armed forces of the United States), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases, on January 2, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in the three consolidated cases, is set forth in the Appendix A, pages 1a-23a.

The opinion of the United States District Court for the District of Columbia, of April 6, 1976 in *Field*

denying all relief in Field's complaints addressing the constitutionality of the criminal statute, 18 U.S.C. 281 is set forth in Appendix A, pages 24a-28a.

The opinion of the United States District Court for the District of Columbia of August 26, 1976, in *Field* enjoining the Secretary of Defense and the Secretary of the Navy, and all of their officers, employees, agents, and attorneys from requiring Field to file Statements of Employment on the grounds of coercive self-incrimination is set forth in Appendix A, pages 29a-34a.

The Opinion of the United States District Court for the District of Columbia of November 12, 1976 in *Field* enjoining the Secretary of Defense and the Secretary of the Navy, and all of their officers, employees, agents, and attorneys from violating The Privacy Act of 1974 is set forth in the Appendix, pages 35a-36a.

The Opinion of the United States District Court for the District of Columbia of June 17, 1977 denying all relief to *Field* under The Privacy Act of 1974 is set forth in Appendix A, pages 37a-38a.

The Order of the United States District Court for the District of Columbia denying plaintiff's (Captain Field's) Motion to require the government to show cause is in Appendix A, page 39a.

The Opinion of the United States District Court for the District of Columbia on January 18, 1978 in *Hoker,* denying all relief on grounds of coercive self-incrimination and violations of The Privacy Act of 1974 is set forth in Appendix A, pages 40a-46a.

The Opinion of the United States District Court for the District of Columbia on May 15, 1978 in *Little,*

enjoining the Secretary of Defense and the Secretary of the Navy from requiring Statements of Employment as being coercively self-incriminating; denying all relief under the Privacy Act of 1974, and dismissing the *Little* complaint in its attacks on the constitutionality of 37 U.S.C. 801(c) is set forth in Appendix A, pages 47a-61a.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and that part of Rule 19(b) of the Rules of The Supreme Court of the United States, in cases where a court of appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; has decided federal questions in a way to conflict with applicable decisions of the Supreme Court; and has so far departed from the accepted and usual courses of judicial proceedings, and has sanctioned similar departures by the lower Courts, as to call for the Supreme Court's exercise of its powers of supervision.

The judgment of the United States Circuit Court of Appeals was entered on November 13, 1979, and a Petition for Rehearing and Suggestion for a Hearing *en banc,* was denied on January 2, 1980.

QUESTIONS PRESENTED

1. Whether a government agency violates The Privacy Act of 1974 by issuing a questionnaire requiring individuals to disclose the name of their employer, their employer's products and services, their title, their duties, and attest to whether or not the individual is violating the definition of an act denounced by both a

criminal statute and a regulatory statute, and submit an explanation if the attestation is in the affirmative, in the absence of any statute or Executive Order of the President authorizing the agency to ask these questions. (This is a case of First Impression.)

2. Whether, under The Privacy Act of 1974, a litigant who is successful in the District Court in obtaining a final judgment, and injunction under The Privacy Act of 1974, which is not appealed by the government agency enjoined, that the agency has violated The Privacy Act of 1974, can be denied his costs and reasonable attorney fees, because in subsequent proceedings, he fails to prove that the violations were "willful or intentional." (This is a case of First Impression.)

3. Whether a government agency, under a permanent injunction to cease using a questionnaire which violates The Privacy Act of 1974, is committing a willful or intentional violation of the Act by continuing to collect, maintain, use, and disseminate the questionnaire from other individuals. (This is a case of First Impression.)

4. Whether the failures of The District Courts and the Circuit Court of Appeals to recognize the fact that a government agency, under a permanent injunction to cease and desist using a questionnaire which had been held to be both coercively self-incriminating, as well as a violation of The Privacy Act of 1974, was actually in contempt of Court in continuing to collect, maintain, use, and disseminate this questionnaire, is evidence of a prejudicial and biased administration of the judicial processes, when the Courts adopted or made up "facts" and applied them to the controversies

to reach opinions contrary to the interests of the prevailing litigants, when the government had not appealed the injunctions against it. (supervisory powers.)

5. Whether a government agency which threatens to withhold the retired pay of individuals; threatens to conduct criminal investigations into the individual's private employment; and holds the power to conduct criminal trials convened by the Head of the Agency, has exerted sufficient coercion on an individual to make a questionnaire addressing possible criminal violations of Federal statutes "coercively self-incriminating", as established by a United States District Court in unappealed injunctions, but has been a continuing practice, despite these injunctions. (Opinion contrary to Supreme Court opinion.)

6. Whether the lower Courts erred in upholding a criminal statute as not being unconstitutionally vague, when the Chief Legal Officers of the named defendants, the Secretary of Defense, the Secretary of the Navy, and the Attorney General of the United States, in official documents add essing the question of vagueness all maintained that the statute was vague, and this opinion was agreed to by the findings of The President's Blue Ribbon Panel on the Department of Defense, 1970. (Federal question.)

7. Whether the lower Courts erred in allowing the government, as defendants, below, to fail to respond to the requirements of the Federal Rules of Civil Procedure requiring a litigant to file papers within the times set by the Rules, to subsequently file these papers long after the plaintiffs (below) had moved under Rule 55 of The Federal Rules of Civil Proce-

dure for Judgment by Default. (Opinion contrary to Supreme Court opinions.)

8. Whether the lower Courts erred in allowing a litigant against whom a judgment by Default had been entered, who did not appeal from this Judgment, to subsequently prevail on the same issues found in default, because the litigant was successfully able to "consolidate" a pending case in the District Court, with two others already on appeal, in which the litigant against whom the original injunctions had been issued had assured the Courts that it had "changed its policies and practices", when the actual actions and documents of the litigant showed this not to be true. (supervisory powers.)

9. Whether 18 U.S.C. 281 as applied to the petitioner, *Field,* is unconstitutional as a Bill of Attainder; an unreasonable constraint on his rights protected by the Fifth Amendment to choose the manner in which he earns his living; is unconstitutionally vague; and is invidiously discriminatory. (Federal question. First Impression.)

10. Whether 37 U.S.C. 801(c) as applied to the petitioner, *Little,* is unconstitutional as a Bill of Attainder; an unreasonable constraint on his rights protected by the Fifth Amendment to choose the manner in which he earns his living; is violative of the due process clause of the Constitution in context of imposing a penalty forfeiture without any judicial intervention or administrative protections; is vague; is invidiously discriminatory; and in view of the penalty forfeiture involved (in excess of $30,000), is a violation of the Eighth Amendment of the Constitution. (Federal question, First Impression.)

11. Whether under the circumstances involving the inception of the controversies raised by *Field* and *Little,* the subsequent actions of the Secretary of Defense, and the situation as evolved by the Circuit Court of Appeals, the petitioners *Field* and *Little* present a justiciable case or controversy, and whether these petitioners have standing to sue in the premises. (Opinion contrary to Supreme Court opinions.)

12. Whether the Supreme Court, in light of unrebuttable evidence that the Secretary of Defense is in continuing contempt of the Orders of the United States District Court for the District of Columbia up to and including the present time, has the inherent power to find the Secretary of Defense in contempt of Court, when the Circuit Court of Appeals mis-stated facts in its opinion which the Secretary of Defense knows are mis-stated, but refuses to comply with the injunctions handed down against him based on the actual facts that he knows to be the true facts of the situation. (Inherent power.)

13. Whether or not statutes which can lead to fines, imprisonment, or penalty forfeitures, which address an otherwise lawful activity are Bills of Attainder, prohibited by the Constitution, when there is no causal or proximate connection between the proscribed legal acts, and any previous actions or activities by the individuals whose future acts are proscribed by the statutes. (Question of standing, decided against Supreme Court precedents.)

14. Whether or not a statute, which, if enforced in the case in controversy by non-judicial procedures, will result in a penalty forfeiture of over $30,000.00 assessed against the individual, is a Bill of Attainder, a

statute enacted in violation of the Eighth Amendment, or both. (Question of standing, decided against Supreme Court precedents.)

15. Whether or not controversies which were obviously ripe at their inception, can be "mooted out" by the aggressor who precipitated the controversies, by the aggressor's voluntary cessation of the acts complained against, in the absence of any assurance by the aggressor that the wrong will not be repeated. (Question decided contra to opinions of the Supreme Court.)

16. Whether the Supreme Court, in view of the fact that the litigants have been before the lower courts for over five years on controversies whose basic, material, relevant and salient, facts have not substantially changed over this period, and which facts are totally and exclusively generated by specific government documents, has the power, *de novo,* to consider these controversies in the light of the truth, the whole truth, and nothing but the truth, free of the various mis-statements spread on the records by the lower Courts and the United States, as a litigant. (Inherent power.)

17. Whether the documented mis-handling of the proceedings, "facts", and law by the lower Courts is of such magnitude as to cause the Supreme Court to express its disapprobation in the premises, in order to assure that in subsequent proceedings, these errors are not committed again. (Supervisory power.)

18. Whether under all the circumstances involved in these controversies, the Supreme Court should order the United States to pay all the costs, reasonable attorney's fees, and damages as provided by law to the

civilian individual litigants petitioning for relief. (Inherent power.)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CONTROVERSIES

"No Bill of Attainder or ex post facto Law shall be passed." (Article 1, Section 9, Clause 3, United States Constitution.)

"No person shall . . . be compelled in any criminal case to be a witness against himself"; (Amendment Five, United States Constitution.)

"No person shall . . . be deprived of life, liberty, or property, without due process of law"; (Amendment Five, United States Constitution.)

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Amendment Eight, United States Constitution.)

18 U.S.C. 281, as set forth in Appendix B, and *infra.*

37 U.S.C. 801(c), as set forth in Appendix B, and *infra.*

5 U.S.C. 552a, The Privacy Act of 1974, as set forth in Appendix B, and *infra.*

Department of Defense Directive 5500.7 and "Statement of Employment" as set forth, *infra.*

STATEMENT OF CONTROVERSIES

Statutes and Regulations

All of the controversies were initiated by the various appellants because of the existence and enforcement

of a regulation in Department of Defense Directive 5500.7 (DOD 5500.7) which, since December of 1961 has required:

> "Each regular retired officer to the armed forces shall file with the military department in which he holds a retired status a Statement of Employment (DD Form 1357). Each regular officer retiring hereafter shall file this Statement within thirty days after retirement. Whenever the information in the statement is no longer accurate, each such officer shall file a new DD Form 1357.
>
> "The military departments shall appropriately review the Statements of employment to assure compliance with applicable statutes and regulations."

Although the format of DD Form 1357 has been changed several times since its first promulgation in December 1961, and some questions have been added and deleted, the DD Forms 1357 have always asked, at least the following four questions:

1. The name of the employer(s).
2. The employer(s)' products and services.
3. The retiree's title.
4. The retiree's duties.

Preceding this requirement in DOD 5500.7 are descriptions of certain statutes which affect the post-retirement employment of retired regular officers.

Of these statutes, 18 U.S.C. 281 is in litigation in the *Field* case, and 37 U.S.C. 801(c) is in litigation in the *Little* case.[1]

[1] On appeal, these cases were assigned Case Number 76-1781 (Field) and 78-1716 (Little). References to the record and exhibits will designate the particular appeal, by these assigned numbers.

DOD 5500.7 describes 18 U.S.C. 281, as follows:

> "He (a retired regular officer) may not, at any time, sell anything to the department in whose service he holds a retired status." [2]

DOD 5500.7 describes 37 U.S.C. 801(c) as follows:

> "He may not, within three years of retirement, sell [3] supplies or war materials to (any of the seven uniformed services.[4])

[2] The actual words in controversy are:

> "Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." (See second paragraph of 18 U.S.C. 281 (1976).

[3] The term "selling" is defined in DOD 5500.7 as:

> "a. Signing a bid, proposal, or contract; b. Negotiating a contract; c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of: (i) Obtaining or negotiating contracts, (ii) negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or (iii) settling disputes concerning performance of a contract, or d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person."

[4] Over the years, the names of some of the seven uniformed services have been changed. The words of the statute (updated) are:

> "Payment may not be made from any appropriation, for a period of three years after his name has been placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service."

The other two statutes addressing retired regular officers set forth in DOD 5500.7 (and only in controversy here vis-a-vis the question of self-incrimination) are 18 U.S.C. 207, a conflicts of interest statute prohibiting all former government officers and employees from switching sides in matters under their cognizance while serving in the government, and 18 U.S.C. 283 which prohibits a retired regular officer, within two years of his retirement from assisting in the prosecution of claims against the United States.

THE PURPOSES OF DOD 5500.7 AND DD FORM 1357

In sworn answers in response to Admissions and Interrogatories served on the Secretary of Defense and the Secretary of the Navy, the government admitted that "no military purposes" were served by the requirements of DOD 5500.7 and DD Form 1357, and that the *sole* purpose was to provide information by which Department of Defense personnel could determine whether or not retired regular officers were violating 18 U.S.C. 207, 18 U.S.C. 281, 18 U.S.C. 283, or 37 U.S.C. 801(c).

Since January 1, 1977, DD Form 1357 has had, printed on its face, this paragraph:

> "PRINCIPAL PURPOSE: Information is required from retired regular officers or enable Department of Defense personnel to determine whether such officers are engaged in activities prohibited by law or regulation, including those that could result in the loss of retired pay or a reduction in retired pay due to other Federal employment"

Subsequent to January 1, 1977, witnesses appearing under oath in response to subpoenas served personally

on the Secretary of Defense and the Secretary of the Navy testified that the phrase "activities prohibited by law or regulation" included, *inter alia,* 18 U.S.C. 207, 18 U.S.C. 281, and 18 U.S.C. 283. (See Transcript of Hearing held on June 2, 1977.)

A SHORT HISTORY OF DOD 5500.7 AND DD FORM 1357

The requirements found in the current DOD 5500.7 that all retired regular officers must submit Statements of Employment were first promulgated in December of 1961, *and have never been changed in the intervening years.*

While the format of DD Form 1357 on which the Statement of Employment has been submitted has been changed over the years, either through issuance of a standard format under the Department of Defense, or varying formats under the various military departments, the same basic four questions addressing the details of the retired officer's employment have never changed.

Nor has there ever been a substantive change to an attestation that the retired officer will submit an updated form whenever the information previously submitted is no longer accurate. The text of this attestation has undergone editorial changes, but the substance has remained constant.

Initially, assurance that every retired officer in 1961 submitted a Statement of Employment was obtained by sending those who did not comply within a reasonable period of the initial promulgation of DOD 5500.7, a series of letters, finally culminating in a statement that unless the Statement of Employment was sub-

mitted forthwith, the officer's retired pay would be stopped.

This administrative procedure persists to this day. A sample of the correspondence appears in the appendix C at pages 83a and 84a.

It is very important for the Court to note that the military departments still maintain all DD Forms ever submitted, by retirees who are still alive, and will use this information in the event a review indicates a violation of a statute or regulation.

The Circuit Court of Appeals "denied" this fact in their opinion, using its negation as a material element in reaching their conclusions.

It is also important that the Court understand that unless a retired officer requests an additional DD Form 1357, that the military departments do not send them out after the first submission. Hence, a relatively small percentage of the appellants are even aware of the recent changes in "format" which this DD Form 1357 has undergone. As a *fact,* neither Captain Field nor Commander Little have ever been issued a "new" DD Form 1357 as discussed *infra.*

A SHORT SUMMARY OF THE FIELD CONTROVERSY

Henry C. Field, Jr. retired as a Captain of the regular Navy on August 1, 1968.

In December of 1973, Captain Field accepted a job with Metro Machine Corporation (Metro). His duties included many tasks involving the collection and analysis of cost data incurred by Metro pursuant to contracts awarded by the Supervisor of Shipbuilding, Construction and Repair, (SUPSHIPS) of Portsmouth, Virginia. Captain Field then negotiated any questions that arose between the data presented by Metro, and SUPSHIPS.[5]

In the summer of 1974 a question arose as to whether or not the duties of Captain Field violated 18 U.S.C. 281.

Numerous conferences and communications followed between various Metro and SUPSHIPS officials, Captain Field, legal personnel at Naval activities in the Norfolk area, and personnel in the Office of The Judge Advocate General of the Navy (JAGN).

Eventually, Captain Field was furnished a copy of JAGN's "Reference Guide to Employment Activities of Retired Naval Personnel."[6] *Inter alia,* The Reference Guide states:

> "As will be readily apparent, this criminal statute is imprecise in its terms, indefinite in its scope, and inscrutible in its application."
> and,
> "The exact meaning and scope of this negatively-phrased and ambiguous statute are not free from doubt."

The text goes on to state, *inter alia:*

> "A convincing argument can be made that its purpose is merely to preserve the restrictions in the civil statutes . . . upon a retired officer's selling to the department from which he was retired."[7]

---

[5] There is no evidence on the record that prior to his retirement from the Navy, Captain Field had ever performed duties involving any contact with Metro. (Cf. 18 U.S.C. 207).

[6] The appropriate pages of this Reference Guide are set forth at JA-49 of the Joint Appendix in Case No. 76-1781.

[7] This civil statute is 37 U.S.C. 801(c) in litigation here in *Little.*

The receipt of the Reference Guide did little to resolve the discussions.

Accordingly, Captain Field, as required by Department of Defense Directive 5500.7 (DOD 5500.7), submitted to JAGN a detailed statement of his duties, requesting an opinion as to whether these were lawful pursuits.[8]

On October 1, 1974, JAGN responded to this enquiry, stating, *inter alia* that it appeared that Captain Field had violated the criminal statute, 18 U.S.C. 281; setting forth the definition found at footnote 3, *supra,* as the definition JAGN used for "selling", and cautioning Captain Field that further contact with JAGN would not be in Captain Field's best interests.[9]

Captain Field, sensing that he had confessed to committing a crime, sought legal counsel.

Counsel prepared a complaint for Declaratory and Injunctive Relief, which over the course of the litigation was amended to reflect the continuing problems encountered by Captain Field in his employment and his rights.

Essentially, this complaint sought injunctive relief to allow Captain Field to continue his work pending the outcome of the controversy; to enjoin the government from taking any further adverse action against Captain Field in criminal prosecution pending the outcome of the action; to enjoin the government from utilizing Statements of Employment on the grounds that they were coercively self-incriminating; to enjoin

[8] This letter is set forth at JA-54 of the Appendix in 76-1781.

[9] This letter is set forth at JA-57 of the Joint Appendix of Case 76-1781.

the government from utilizing Statements of Employment on the grounds that they violated The Privacy Act of 1974; and the remedies of declaratory relief as applied to attacks on the constitutionality of 18 U.S.C. 281 as being a Bill of Attainder; unconstitutionally vague; invidiously discriminatory; and an unreasonable and unnecessary deprivation of his right, by due process, to choose the manner in which he earned his living.[10]

The complaint was assigned to Judge Charles R. Richey, of the United States District Court for the District of Columbia.

As the record shows, this controversy dragged on and on. *There are now over one hundred and eighty Docket Entries on the Docket Entry Forms of the United States District Court for the District of Columbia and the United States Circuit of Appeals for the District of Columbia Circuit.*

A SHORT SUMMARY OF THE LITTLE CONTROVERSY

(Because the Circuit Court of Appeals mis-stated some of the essential facts involving James G. Little, and refused to grant a rehearing or correct these errors, the following reflects what actually happened in the *Little* case.)

James G. Little served in the Navy from 1956 through October 1, 1974, when he was retired as a "regular" officer with the rank of Commander.

[10] There were never any serious questions raised by the government, or contemplated by the Courts as to the adequacy and legal viability of the allegations as set forth in the complaints.

In December of 1974 he obtained employment with Sperry Flight Systems (Sperry).[11]

In accordance with instructions, Commander Little submitted Statements of Employment (updated to October 1, 1975 and October 22, 1975) to the Commanding Officer, Navy Finance Center, Cleveland, Ohio, the custodian of Commander Little's retired pay accounts.

The Commanding Officer of the Cleveland Finance Center forwarded these Statements to the Commander, Navy Finance and Accounting Center, Washington, D.C., the immediate superior, who, in turn, forwarded them to JAGN, requesting an opinion as to whether or not Commander Little had violated 37 U.S.C. 801(c).

On January 15, 1976, referencing 18 U.S.C. 281, 37 U.S.C. 801(c), and the Reference Guide (*supra*), JAGN addressed a letter to Commander Little seeking clarification of a statement in the October 1, 1975 Statement of Employment which read:

> "Establish liaison with customer to assist in exchange of information regarding customer's requirements vs. Sperry products. Customers include private corporations, general aviation dealers, FAA, Coast Guard, Navy, National Weather Service, Bureau of Standards, and foreign embassies."[12]

[11] As in the *Field* case, three investigations by the Naval Investigative Service failed to develop any evidence that while on active duty, Commander Little had any contacts, whatsoever, with Sperry. (Cf. 18 U.S.C. 207).

[12] The letter also contained the following statement:

> "In accordance with the provisions of the Privacy Act of 1974, (5 U.S.C. 552a), I must advise you of the following additional matters concerning your request. The information is requested under the authority of 5 U.S.C. 301 and 44 U.S.C. 3101 for the principal purpose of enabling naval authorities to monitor compliance with laws providing civil and criminal penalties for engaging in proscribed post-retirement employment activities. Information provided by you in response to this request may be furnished other Department of Defense components, the U.S. General Accounting Office, and the Department of Justice, as may be appropriate for review, investigation, administrative action, criminal prosecution, or civil litigation. Disclosure of the information requested is voluntary, but refusal to provide the information may necessitate resorting to other channels of inquiry to determine the legality of your post-retirement employment."

On January 20, 1976, Commander Little wrote to JAGN noting that he had updated his DD Form 1357 on October 22, 1975.

On January 28, 1976, JAGN wrote to Commander Little asking him to explain the clause, "sales . . . thru . . . Foreign Military Sales Offices . . ." which appeared on Commander Little's October 22, 1975 Statement of Employment.[13]

Commander Little refused to respond to this January 28, 1976 letter.

It is now necessary for an understanding of Commander Little's complaint to refer to certain chronology and Orders in Captain Field's case.

On August 26, 1976, Judge Richey handed down an Order holding that the requirements of DOD 5500.7 and the questions asked on DD Form 1357 were coercively self incriminating. He enjoined the Secretary of Defense, the Secretary of the Navy, and all of their officers, employees, agents and attorneys in the premises. This Order is set forth in Appendix A, at pages 29a-34a.

[13] This letter of January 28, 1976 repeated the Privacy Act Statement set forth in footnote 12. These DD Forms and referenced correspondence appear between JA 6 and JA 10 of Case No. 78-1716.

The government did not ask for any stay of execution of this Order, nor did the government appeal this Order.

On October 19, 1979, *over seven weeks after Judge Richey's Orders of August 26, 1977 holding that the DD Form 1357 was coercively self-incriminating* and enjoining the Secretary of Defense and the Secretary of the Navy and all of their officers, employees, agents, and attorneys in the premises, JAGN sent Commander Little's DD Forms 1357 to the Director of the Naval Investigative Service (NIS), requesting an investigation to ascertain whether Commander Little had violated 18 U.S.C. 281 and/or 37 U.S.C. 801(c).

On November 12, 1976, Judge Richey handed down another Order, holding the questions on DD Form 1357 were violations of The Privacy Act of 1974 (5 U.S.C. 552a), and enjoining the Secretary of Defense, the Secretary of the Navy, and all of their officers, employees, agents and attorneys in the premises.

The government did not appeal this Order.

Despite the existence of these two Orders, NIS conducted an investigation on December 21, 1977 using Commander Little's DD Form 1357 submitted on October 22, 1975 as the basis of the enquiry.

This Investigative Report was forwarded to JAGN on December 27, 1977.

On February 4, 1977, JAGN addressed a letter to the Commander, Navy Finance and Accounting Center, with copies to the Commanding Officer, Navy Finance Center, Cleveland and to Commander Little, stating that it was the opinion of JAGN that the DD Forms 1357 and the NIS Report indicated that Commander

Little had violated 37 U.S.C. 801(c), and had done so during the entire period of time Commander Little had been employed by Sperry.[14]

Commander Little recognizing that he was in some degree of trouble, asked The Retired Officers Association for assistance, and was referred to Captain Field's counsel.

Captain Field's counsel immediately called both the Navy Finance and Accounting Center and the Navy Finance Center and spoke directly to the two officials who were handling the case. He informed both of Judge Richey's Orders, and requested that they ask for further legal review. Both officials replied that there were no attorneys attached to their activities, and insofar as they were concerned, the JAGN opinion was binding, and Commander Little would lose his retired pay until the amount lost equalled the payments received during his employment with Sperry.

Counsel then called Rear Admiral C. E. McDowell who has signed the February 4, 1977 as "Acting Judge Advocate General." Counsel asked Admiral McDowell for a conference on this matter, and Admiral McDowell stated that nothing counsel could say to him would cause Admiral McDowell to change his opinion.

Counsel, having exhausted all "administrative remedies" [15] prepared a complaint for declaratory and injunctive relief. This was filed on March 2, 1977.

---

[14] Commander Little had resigned from Sperry's employment on March 20, 1976. For the period between December 1974 and March 1976, Commander Little had received approximately $30,000.00 in retired pay. The JAGN referral to NIS and the NIS Report appear at JA 10 and 11 of Case No. 78-1716.

[15] See Counsel's affidavit at JA 15, Case No. 78-1716. During the course of this litigation by invoking the rules of discovery and

Essentially, this complaint applied for a Temporary Restraining Order and a Preliminary Injunction to enjoin the Navy from stopping Commander Little's retired pay until he could attain a hearing on the merits of his complaint. The complaint applied for an injunction against the government from using the DD Forms 1357 on the grounds they were coercively self-incriminating; and an injunction, as well as the remedies and damages provided by The Privacy Act of 1974 for the government's violations of the Act. The complaint also asked for the remedies available under the Declaratory Judgment Statutes in attacking the constitutionality of 37 U.S.C. 801(c) on the grounds that it was a Bill of Attainder; was vague; was invidiously discriminatory; was an unreasonable and unnecessary constraint on the due process right of an individual to choose the manner in which he earned his living; and in light of the threatened $30,000.00 forfeiture, was a violation of the Eighth Amendment.[16]

Because the major thrust of the complaint was against 37 U.S.C. 801(c), and Judge Richey, at that time, had only an "evidentiary hearing" as to whether the government had willfully or intentionally violated

The Freedom of Information Act (5 U.S.C. 552) the appellants attempted to prove under the jurisdiction pleaded from The Administrative Procedure Act, 5 U.S.C. 701 et seq., their allegations set forth in the negative, that the government did not have any procedures, formal or informal in the enforcement of these statutes, particularly 37 U.S.C. 801(c). In response to these efforts, the government furnished nothing, often simply sending copies of DOD 5500.7 and DD Forms 1357. As the litigation unfolded, it became totally obvious that the appellants' original contention was absolutely true. See Appendix C, pages 76a to 83a.

[16] As in *Field* there was never any serious attack or consideration by the Court as to the sufficiency and viability of the allegations of the complaint.

the Privacy Act vis-a-vis Captain Field, the Clerk of the District Court assigned the case to United States District Judge (now Senior District Judge) Howard F. Corcoran.

The United States Attorney assigned to the complaint called Commander Little's Counsel stating that it was impossible to respond to the application for a Temporary Restraining Order, and that a Motion for an Extension of Time was going to be filed, and would Commander Little's counsel accede to this.

Counsel responded that if the government would insure that a Hearing on the Merits be scheduled prior to April 1, 1977; would guarantee that Commander Little's retired pay would not be stopped prior to that date; and would prepare its Answer to the Complaint in sufficient time to allow a response, that no objection to an extension of time would be entered.

The United States Attorney called back and stated that a Hearing on the Merits had been scheduled on March 31, 1977; the Navy had agreed not to stop Commander Little's pay prior to the Hearing; and that the Answer would be filed shortly.

Twice thereafter, the government requested extensions of time to file the Answer, and it was finally hand delivered to Comander Little's counsel on the evening of March 28, 1977. This was in the form of a Motion to Dismiss.

A response to this Motion to Dismiss was filed on March 29, 1977. This Motion pointed out numerous errors of "fact" stated by the government, as well as numerous "administrative" admissions couched in terms that actually denied what was admitted.

On March 31, 1977, Judge Corcoran only heard arguments on the application for a preliminary injunction to prohibit the government from stopping Commander Little's retired pay until a final hearing on the merits was held, and final Orders handed down.

Judge Corcoran denied Commander Little's application for a preliminary injunction, but stated that he was going to hold an early hearing on the merits.

Judge Corcoran did not conduct any hearings on the merits.

There are "only" forty-three Docket Entries in *Little* in the District Court . . . mainly generated by Commander Little's counsel attempting to keep the record straight as the Navy further proceeded against Commander Little, and to precipitate the promised Hearing on the Merits.

On May 15, 1978, Judge Corcoran handed down his Orders. These are essentially in three parts as shown in Appendix A, at pages 47a to 61a.

> I. On the issue of coercive self-incrimination, Judge Corcoran held that the questions were coercively self-incriminating, and enjoined the government in the premises, as had Judge Richey on August 26, 1976.
>
> The government did not appeal this Order.
>
> II. On the issue of The Privacy Act of 1974, Judge Corcoran held that the government had not violated The Privacy Act of 1974, basing his opinion on the *Hoker* case, *infra.*

Commander Little appealed this Order, and the appeal was assigned Number 78-1716 by the Circuit Court of Appeals.

The Circuit Court of Appeals "affirmed" Judge Corcoran's Order, which in effect, also "reversed" the unappealed Order of Judge Richey handed down on November 12, 1976.

> III. On the issues of the unconstitutionality of 37 U.S.C. 801(c), Judge Corcoran dismissed the complaint.

Commander Little appealed this Order in Appeal 78-1716.

The Circuit Court "affirmed" Judge Corcoran's Order, stating (a fact obviously untrue as has been shown, *supra*) that "Shortly after the filing of this complaint, the United States Attorney for the District of Columbia informed appellant's counsel that the Judge Advocate General of the Navy had reviewed appellant's DD Forms 1357 and determined that the information available did not justify the conclusion that appellant had violated 37 U.S.C. 801(c), despite earlier implications to the contrary." [17]

A SHORT SUMMARY OF THE HOKER CONTROVERSY

During the course of the *Field* controversy, a large number of retired regular officers had become "involved" with problems relating to their submission of DD Forms 1357, or from the impact of "interpreta-

[17] Why the Circuit Court should have made such a statement in view of the actual record before it is not known, save that the statement indicates a predeliction by the Circuit Court to reach an opinion in the government's favor, and to ignore the subsequent actions by the government, which so obviously violated Commander Little's rights in a very aggravated manner. The record shows, at JA 21 through 25, that on June 8, 1977 the Navy Comptroller asked NIS to conduct further investigations, and these reports are also set out.

tions" of the post-retirement statutes. During this period, spasmodic efforts were made to try to enforce 37 U.S.C. 801(c), and 18 U.S.C. 281. These officers, as well as hundreds of others had contributed financial support to Captain Field.

With Judge Richey's Orders of August 26, 1976 and November 12, 1976, these retirees believed that their problems with DD Form 1357 were over, and the only problems for the future revolved around the actual constitutionality of the statutes in the event the government attempted to enforce them.

When Commander Little "got into trouble", these retired regular officers realized that the government had not been deterred by Judge Richey's Orders.

A retired Navy Captain, Joseph E. Hoker then led a group of retired regular officers in applying to maintain a class action under Rule 23 of The Federal Rules of Civil Procedure. A complaint seeking injunctive relief against any further use of DD Form 1357 as being coercively self-incriminating, and to seek the remedies provided by statute under The Privacy Act of 1974 for the violation of their rights by the government in maintaining and continuing to require these forms.

Originally, Captain Hoker tried to join with Commander Little. However, Judge Corcoran stated he would prefer the complaints to be filed separately

Captain Hoker then withdrew his complaint, and waited until the end of April in the expectation that Judge Corcoran would hold an early hearing in *Little* as Judge Corcoran stated on March 31, 1977, and possibly resolve the problems in this Hearing.

Because several of the appellants were also "under the gun" of DD Form 1357, when Judge Corcoran did not hold a hearing in *Little*, the complaint and application for a class action was filed on April 29, 1977.

The complaint addressed the issue of self-incrimination as addressed by Judge Richey's Orders of August 26, 1976 and violations of The Privacy Act of 1974 as addressed in Judge Richey's Orders of November 12, 1976.

The only Order handed down by Judge Corcoran (there were no hearings) was dated January 19, 1978. (Pages 40a to 46a, Appendix A.) This denied all relief, and *Hoker* appealed as appeal number 78-1376.

WHY THE WRIT SHOULD ISSUE

The writ should issue because the Circuit Court of Appeals has completely emasculated The Privacy Act of 1974, and done grave violence to the basic tenets of protection from coercive self-incrimination.

These opinions stand without any "modifications" addressing any kind of "military status" of the appellants, and hence, *obviously affect all persons* similarly situated vis-a-vis the government, and attempts by government agencies to require individuals to answer questionnaires which might tend to incriminate the respondent, and in any event, invades and violates his privacy.

The writ should issue because the Circuit Court of Appeals failed to even consider any of the issues raised addressing the procedural deficiencies of the government in the District Courts, and the District Courts' continued proclivity to simply ignore their duty to enforce the Federal Rules of Civil Procedure.

The writ should issue because the Circuit Court of Appeals has so obviously framed a conclusion of law, and then reasoned towards it, that it changed basic, material, salient facts in order to avoid considering the facts which would make the conclusions untenable.

The writ should issue because the government has overtly stood in complete contempt of the lower Courts, knowingly, and willfully, apparently under a preconceived conviction that the Courts would overlook these contempts, an assumption which proved to be totally "justified."

The writ should issue because fine Americans, who have done absolutely nothing that is even conceptually morally or ethically wrong, but on the contrary, have performed honorable, loyal, and devoted service to their Nation, seek protections of a veritable "bundle" of basic and fundamental rights which their sovereign has deprived them, either because of the enactment of odious statutes, or the insistence by the Secretary of Defense that the statutes be enforced by unlawful means.

The writ should issue to make the appellants whole in every respect. They are entitled to the costs and attorney fees associated with violations of the Privacy Act; they are entitled to the damages associated with the willful and intentional violations of the Act; and they are entitled to recover all other costs and fees, because of the contemptuous manner in which the government has been allowed to string this litigation out over the years.

The writ should issue so that this Court might exercise its supervisory powers over the lower courts, who so obviously conducted proceedings that were biased, prejudicial, and in violation of the Federal Rules of

Civil Procedure against one litigant in favor of the other.

SUMMARY OF ARGUMENT

General

The tactics and methodologies of pleading (or failing to plead) by the government; and the indulgences of the lower Courts, not only in these tactics and methodologies, but in injecting assumptions into their judgments which were apparently made up out of whole cloth, since the assumptions were completely opposite to the documents before the Courts, has created a microcosm of untenable judicial administration of these controversies.

What were relatively simple and straight-forward controversies, based on readily perceivable facts, have now become entangled in fictions invented by both the government and the lower Courts.

The appellants are somewhat reluctant to plow over this ground. There are now more than 280 Docket Entries in the lower Courts, including fifty-four Orders, on which thirty are interlocutory or final Orders addressing various issues.

On numerous occasions, the appellants invoked Rule 55 of The Federal Rules of Civil Procedure when the government failed to defend issues (and entire controversies as in *Hoker*), and only once was such a Motion granted, and that by Judge Richey in his November 12, 1976 Order, whose "effect" has now been overruled by the Circuit Court.

On the actual facts alleged by the appellants, there were never any serious questions about the "jurisdiction" by the Courts, *ab initio.*

Both Captain Field and Commander Little were obviously in very deep trouble, and The Privacy Act of 1974 actually encouraged Captain Hoker to take advantage of the remedies available in that statute. In no manner of speaking were Captain Field and Commander Little merely seeking "Advisory Opinions."

Insofar as "jurisdiction" over the Constitutional issues raised by Captain Field and Commander Little are concerned, the "defense" by the "government" totally turned on trying to back-off from the adverse actions the government had initiated which impelled these litigants into Court in the first place.

The situation in Captain Field's case even today is unbelievable *as a matter of law*. His "complaint" addressing 18 U.S.C. 281, was returned to the District Court with instructions to now dismiss it "without prejudice", pending a possibility that the Attorney General might change his mind at some future time, and decide that 18 U.S.C. 281 is not "vague".

Yet, the record shows that for over four years, the same Attorney General stood before the Courts, as a named defendant, maintaining that the statute was *not vague,* and did this quite successfully.

What the Circuit Court has obviously done here is abandon its Constitutional duty to interpret the statutes of Congress, and passed it on to the Attorney General, who has already taken both sides of the issue.

This judicial power has been established for so long . . . . since *Marbury* v. *Madison,* 1 Cr. 137 (1803), that the proposition is axiomatic, today. It is obvious error for the Circuit Court to abandon this power.

In Commander Little's allegations addressing coercive self-incrimination and The Privacy Act, and in

Captain Hoker's entire complaint, the government was simply in obvious contempt of the Court. *United States* v. *Shipp,* 203 U.S. 563 (1906).

Yet, when in utter frustration, Captain Field raised this issue in a Motion to Require the Government to Show Cause why it should not be cited for Contempt, Judge Richey denied the Motion, and the Circuit Court of Appeals, on May 31, 1978 *sua sponte* dismissed an attempt to appeal this Order, which had been handed down by Judge Richey on November 30, 1978 (see page 39a, Appendix A), and appealed by Captain Field within sixty days of the Order as provided by the Appellate Rules.

The November 30, 1978 Order of Judge Richey was then adopted as part of the "law of the case" in *Hoker,* and then *Hoker* was applied as part of the law of the case in *Little.*

On appeal, all three appellants raised numerous "procedural issues", revolving around admissions by the government by either failing to plead at all; submitting frivolous pleadings; or submitting pleadings which under no stretch of the imagination complied in sufficiency to the requirements of The Federal Rules of Civil Procedure.

The Circuit Court of Appeals simply totally ignored all of these issues, and even, as noted, vitiated the single Order ever handed down in which the Rules were properly applied, when Judge Richey invoked the Rules on November 12, 1976.

The "trouble is" that this happened all the time.

One of the simplest and straightforward of these "happenings" is evident on the Docket Entries of *Hoker,* without even going into any arguments.

Here, the Docket shows that the complaint was filed on April 29, 1977.

Under Rule 12(a), the government has sixty days to respond to such complaints.

On July 1, the government filed an "Answer", which was nothing more than a common law demurrer, obviously drafted by an attorney who had no experience with either the Federal Rules of Civil Procedure, or the local rules which require Memoranda of Points and Authorities to accompany all responses and Motions.

Also on July 1, 1977, the government filed a Motion for an Extension of Time to oppose Hoker's application to maintain a Class Action.

Captain Hoker moved to strike the Answer on the grounds that it was totally unresponsive to either the Rules or the complaint (it simply denied all the allegations in the complaint, all of which were based on the government's own documents, or Judge Richey's Orders.)

Judge Corcoran granted the Motion to Extend Time to oppose Captain Hoker's Application to Maintain a Class Action, up to and including August 21, 1977.

No response was filed by that date, nor was one filed prior to Captain Hoker's Motion for Judgment by Default on this issue that he filed on September 8, 1976, nearly two weeks after the government had failed to oppose the Application to Maintain a Class Action.

Judge Corcoran simply ignored the inescapable law implicit in these Motions, and proceeded on January 19, 1978 to deny all of Captain Hoker's Motions, and dismiss the complaint.

The appellants firmly believe they are right, and always have been right "on the merits" of their pleadings. However, when an opposing litigant fails to respond to pleading on their merits, the moving litigant is entitled to judgment without having to drag his case on and on through the Courts, in the absence of any fraud and collusion. *Riehle* v. *Margolies,* 279 U.S. 218 (1929), *Morris* v. *Jones,* 329 U.S. 545 (1947).

But now, the appellants are very "gun shy". While they retain their confidence that, in the final analysis, justice will be done; they are extremely worried that because the lower Courts have leaned so far over backwards to assist the government, that a very heavy additional burden of proof has been placed on the appellants.

They must now assume, though they believe the perception is not a proper burden for them to have to carry, that *they are now litigating both against the government and the lower Courts.*

THE PRIVACY ACT OF 1974

The Privacy Act of 1974, Public Law 93-579, 88 Stat. 1897, as amended by Public Law 94-185, 89 Stat. 1057, became law on December 31, 1974, and by its provisions, became "effective" two hundred and seventy days later. (September 27, 1975).

These are all cases of first impression arising under the terms and remedies provided by this statute.

PROCEEDINGS AND DECISIONS IN THE DISTRICT COURTS

Captain Field moved to amend his complaint on February 23, 1976, alleging, *inter alia,* that the con-

tinuing requirement in DOD 5500.7 that he submit Statements of Employment violated the Privacy Act since there was neither Congressional authority nor authority under any Executive Order of the President, authorizing the Secretary of Defense to ask such questions, as required by the statute.

By Orders of April 6, 1976, Judge Richey granted the Motion to Amend, and instructed the government to submit a response within the time allowed by the Federal Rules of Civil Procedure.[18]

On June 24, 1976, the government having filed no response, Captain Field moved for judgment by default under Rule 55 of the Federal Rules of Civil Procedure.

The government did not take advantage of the special consideration afforded it under Rule 55 (e).

After numerous other pleadings addressing the Privacy Act and other issues filed by Captain Field, Judge Richey on November 12, 1976 held that since the government had failed to respond to the complaint, it would be treated as conceded.

Judge Richey then permanently enjoined the Secretary of Defense and the Secretary of the Navy, and all of their officers, employees, agents, and attorneys in the premises.

The government did not appeal these Orders.

On March 2, 1977, Commander Little filed his complaint for declaratory and injunctive relief, alleging, *inter alia* that the use of a Statement of Employment filed by Commander Little on October 25, 1975, by the

[18] Under Rule 12(a) the government has sixty days to respond.

Judge Advocate General of the Navy on February 4, 1977 was a willful and intentional violation of the Privacy Act, and that the continuing requirements of DOD 5500.7 that Commander Little submit Statements of Employment constituted a continuing willful and intentional violation of the statute.

On March 28, 1977, the government filed an "Answer" to Commander Little's complaint, addressing the Privacy Act allegations, *inter alia* in the framework of a common law demurrer, simply denying all the documented facts and the allegations. This pleading, however, was accompanied by a Memorandum of Points and Authorities as required by the local rules.

On April 29, 1977, Captain Hoker, representing numerous retired regular officers who had submitted Statements of Employment, some of whom were involved in problems stemming from these submissions, filed a class action in the name of all retired regular officers, alleging that the continued collection, use, maintenance, and dissemination of these Statements of Employment as required to be submitted by DOD 5500.7 constituted a willful and intentional violation of the statute.

On June 2, 1977, pursuant to a request filed by Captain Field on November 18, 1976 as allowed by the Order of November 12, 1976, Judge Richey conducted an "evidentiary hearing" on the issue as to whether or not the government's *conceded* violation of the Privacy Act in Captain Field's case, was "willful or intentional", and whether Captain Field was therefore entitled to the damages provided by subsection (g)(4) of the Act.

On June 17, 1977, Judge Richey held that Captain Field had failed to prove that the government had willfully and intentionally violated the Privacy Act, and denied any damages to Captain Field, as well as any costs and reasonable attorney's fees as provided by subsection (g) of the Act.

Captain Field appealed this Order, and it was assigned Case Number 78-1336 by the Circuit Court.

On July 1, 1977, the government filed an "Answer" to the complaint in *Hoker*, and on the same date, Moved for an Extension of Time to respond the Captain Hoker's Application to Maintain a Class Action.

On July 13, 1977, Captain Hoker Moved to strike the Answer filed on July 1, 1977 on the grounds that it was, at best, a common law demurrer, simply denying all the known facts and allegations, and was unaccompanied by any Memorandum of Points and Authorities as required by the local rules of the United States District Court for the District of Columbia.

On July 13, 1977, Captain Hoker also opposed the Motion to Extend Time to oppose his application to maintain a class action on the grounds that the government had had plenty of time to frame such an opposition, and by the past history of the manner in which the government had been pleading in both the *Field* and *Little* controversies that all the evidence indicated some kind of tactic calculated to confuse the Court.

On August 3, 1977, Judge Corcoran granted the government's Motion to Extend time, up to and through August 21, 1977.

On September 8, 1977, the government having failed to file any opposition to Captain Hoker's application

to maintain a class action, Captain Hoker moved for judgement by default under Rule 55, and repeated his previous motion for judgement on the pleadings vis-a-vis the merits of his allegations addressing the Privacy Act of 1977.

On September 28, 1977, Captain Field submitted two official communications he had received from the Navy subsequent to Judge Richey's June 17, 1977 Orders denying any relief, in which two different activities had sent communications stating that Captain Field must comply with DOD 5500.7 and submit Statements of Employment. Captain Field moved that the Court should require the government to show cause why they should not be cited for contempt for continuing to dun Captain Field for these Statements.

The government did not respond.

On September 30, 1977, the government filed a "Cross Motion for Summary Judgement" in the *Hoker* case, as well as oppositions to the previously filed Motions by Captain Hoker. This did not address the application to maintain a class action.

On October 13, 1977 Captain Hoker responded to the September 30, 1977 Cross-Motion, again suggesting that these kinds of pleadings were totally out of place, too late, and even in the recitation of "Facts on Which there were no Material Issues", the government had ignored facts they knew to be true; had mis-stated facts knowing these were mis-stated; and the government generally admitted the validity of the complaint while, at the same time, denying it.

On November 9, 1977, the government filed an opposition to Captain Hoker's application to maintain a class action.

On November 21, 1977, Captain Hoker filed a response to the government's opposition to his application to maintain a class action, and moved to strike it.

On November 30, 1977, in the absence of any response from the government addressing Captain Field's Motion to Require the government to show cause, Judge Richey dismissed Captain Field's Motion[19]

On January 19, 1978, Judge Corcoran dismissed the entire Hoker complaint, denying the application to maintain a class action; to strike the Answer; to grant judgement by default; and granting the government's motion for summary judgment.

Captain Hoker appealed this Order, and it was assigned Appeal Number 78-1376 by the Circuit Court of Appeals.

On May 15, 1978, Judge Corcoran granted Commander Little's prayers for injunction relief on the grounds that the questions asked on DOD Form 1357 were coercively self-incriminating, and denied all other relief, holding that the questions did not violate the Privacy Act, and dismissing the remainder of the complaint addressing the constitutionality of 37 U.S.C. 801(e).

The government did not appeal the Order against it.

Commander Little appealed all the Orders against him. This appeal was assigned Appeal Number 78-1716 by the Circuit Court of Appeals.

---

[19] Captain Field appealed this Order, but on May 31, 1978 this appeal was dismissed, *sua sponte*, without opinion, by the Circuit Court. See Appeal Number 78-1234, C.C.A.D.C.

PROCEEDINGS AND OPINION OF THE CIRCUIT COURT

On appeal, all of the appellants raised the various "procedural issues" implicit above, maintaining that the District Courts had erred consistently by not granting judgement by default and on the pleadings, and had made a mockery out of Rule 1, of the Federal Rules of Civil Procedure requiring speedy, just, and inexpensive determinations of all controversies, as well as a mockery out of the specific rules requiring litigants to plead properly, on time, or be subject to judgements by default.

The government did not address any of these issues in their Appeal Brief, and the Circuit Court of Appeals totally ignored all of these issues.

In addressing the "controversies on the merits", the Circuit Court, although addressing the Privacy Act for the first time, totally ignored the Legislative History; the stated "Congressional Findings and Statement of Purpose" set forth in section 2, of the Act, and all other elements of the Act save for three parts of subsection (e) of the Act.

In applying the "facts of the controversies" to these three parts of subsection (e), the Circuit Court adopted, in its text and in various footnotes, various statements urged by the government, and various statements adopted without urging by either party, which were not only manifestly not true, and contrary to the documented facts before the Court, but which, amongst themselves were in conflict and inconsistent.

In a Petition for Rehearing, the appellants analyzed these inconsistencies, and submitted even newer documentation than had been available when the Appeals

Briefs had been filed, to substantiate the appellant's statements.

The Circuit Court, *sua sponte,* without any opposition or explanation by the government, denied the Petition for a Rehearing on January 2, 1980, and this is the basis for this part of this appeal.

GENERAL CONDITIONS PRECEDING THE PRIVACY ACT OF 1974

Americans, of course, have always been conscious of their rights of Privacy, and a considerable body of law has been built around the Fourth Amendment.

Because of evolving political climates, and a growing capability for the government to gather, collate, and disseminate information, the Congress and the Public became more and more restive concerning the information held by the government and its data banks.

The first major step towards resolving this concern in detailed legislation is commonly known as The Freedom of Information Act, 5 U.S.C. 552 (1976).

This Act provided a broad entre by the private sector in obtaining information dealing with both government operations, and in many instances, provided an individual entre to any records maintained by the government which involved him.

As experience grew, it was apparent that there were still unresolved problems of public interest, and the concepts of The Privacy Act of 1974 evolved from this experience.

Essentially, it was found to be difficult to purge an existing record; and it was found to be difficult to stop

the government from slaking an almost unquenchable thirst for data and information, much of which involved matters of privacy insofar as the individual was concerned.

Extensive hearings were held in the premises, and hundreds upon hundreds of pages of testimony were taken before Congressional Committees.

The only major concerns expressed by any individuals not giving full support to the concepts, were from those government agencies which in their intelligence gathering or law enforcement functions foresaw certain problems.

These were worked out, and in the final enactment, the Congress provided for certain exemptions from the general constraints enacted in the remainder of the Bill.

THE LEGISLATIVE HISTORY

The official Legislative History of the statute is found between pages 6916 and 6998 of the 1974 U.S. Code, Congressional and Administrative News.

Here, the problems perceived by the Congress and the public are discussed and the overall Legislative Intent is formulated.

There is not a word in this Legislative History to even hint that the Congress was imposing any constraints on private persons, or in any manner of speaking, taking away from him rights of privacy which previously existed.

The entire thrust of the entire history addresses very severe new constraints to be imposed upon government agencies in their maintenance of existing records, and any future collection, maintenance, use, or

dissemination of information in the future, and a granting of *additional* rights to persons "aggrieved" by a failure of the government agency failing to abide by the new rules.

The Legislative History forges two new links in the chain following The Freedom of Information Act. The first provided a means wherein the individual could force the government to remove from its data banks and information files, unauthorized information being maintained about the individual.

The second, at issue here, required the government, on its own initiative to purge its files of information that was already in its possession but would not be authorized under the statute, and to proscribe the future collection, maintenance, use and dissemination of such information.

Actually, there is nothing complex or mysterious about the statute. It is reasonably clear for legislative syntax; it addresses a problem that was universally accepted as being a problem; and did this in sufficiently clear terms to cause government agencies to comply quite readily.

The appellants believe that this is why so little litigation has arisen around this statute, versus the stream of litigation which is always apparent in Freedom of Information Act cases.

THE CONTENTS OF THE STATUTE

The contents of the statute speak for themselves.

Section 2 of the Act states the Congressional Findings and Statement of Purpose.

Section 3 contains the substantive portions of the Act.

Subsection (a) provides the definitions of terms.

Subsections (b) and (c) set the "Conditions of Disclosure," and "Accounting" for Disclosure rules.

Subsection (d) provides for access to records, by individuals and for the correction of these records.

Subsection (e) sets the requirements that all agencies must follow.

Subsection (f) sets the rules that the agencies must promulgate in carrying out the requirements.

Subsection (g) provides for civil remedies for aggrieved individuals.

Subsection (h) establishes the rights of legal guardians in the premises.

Subsection (i) establishes criminal penalties for willful or intentional violations of the statute.

Subsection (j) provides the general exemptions from the Act involving intelligence and law enforcement matters.

Subsection (k) addresses other exemptions involving other specific statutes.

Subsection (l) addresses archival records.

Subsections (m) through (q) provide for special matters involving government contractors, mailing lists, reports, and effects on other laws.

THE OPINION OF THE CIRCUIT COURT

In the final analysis, the Circuit Court reached an opinion that the government was in compliance with the Privacy Act of 1974, no matter which "format" of DD Form 1357 was under consideration.

On the face of the opinion, it is clear that the Circuit Court of Appeals cited no "precedents" relating to

any part of their reasoning; did not address any part of the Legislative History or the stated Congressional Findings and Statement of Purposes in section 2 of the statute which could have guided them in these cases of first impression; and indeed, ignored the definitions and all the related text of the statute, concentrating only on subsections (e) (1), (e) (2) and (e) (3) of the Act, which they interpreted in a totally "*permissive*" context, as opposed to the obviously "*restrictive context*" implicit in the Legislative History, and the stated Congressional Findings and Statement of Purposes.

Equally distressingly, the Circuit Court then picked and chose from amongst various miscellaneous "facts" available; adapted some of these totally out of their actual context; and when there were no others available from the record to support their conclusions of law, made basic assumptions which the record shows are totally untrue.

Hence, the appellants find themselves faced with the formidable task of "litigating against the Circuit Court of Appeals" insofar as establishing the actual facts of the controversies, as well as arguing the proper law that should be found.

JURISDICTION

There was never any question about basic jurisdiction. Subsection (g) of the statute spells this out in subsection (g)(5).

The real question of "jurisdiction" the Circuit Court *should* have addressed was why it was allowing the government, at this late date to even find any standing to "defend" in the premises.

The proper issue the Circuit Court should have investigated was why the government, under the permanent, unappealed Order handed down by Judge Richey on November 12, 1976 had the temerity to continue the collection, maintenance, use, and dissemination of the questionnaire struck down by the Court as being both coercively self-incriminatory and a violation of The Privacy Act of 1974. *Hayes* v. *Fisher*, 102 U.S. 121 (1880), *Howat* v. *Kansas*, 250 U.S. 181 (1922); *Eilenbecker* v. *District Court*, 134 U.S. 131 (1890).

And the appellants believe this is a question which this Court should properly address.

The appellants also appreciate the very broad jurisdiction of this Court in the premises to address the merits of the allegations *de novo* regardless of the fact that the government has by a proper application of Rule 55 of the Federal Rules of Civil Procedure, already conceded.

THE PRIVACY ACT OF 1974, SUBSTANTIVE

Section 2 of the enacted statute addresses the "Congressional Findings and Statement of Purpose."

This section repeats in more concise terminology the concerns expressed in the Legislative History.

In essence, the Statement of Findings addresses the realities that the privacy of an individual can be directly affected by the collection, maintenance, use, and dissemination of information by government agencies; that the increasing use of computers and other sophisticated information handling techniques poses a threat to privacy; the effect that information might have on individuals in seeking employment, insurance, credit,

due process, and legal protections; the fact that the right of privacy is a fundamental right protected by the Constitution; and in order to protect individuals, *"it is necessary and proper for the Congress to regulate the collection, maintenance, use, as dissemination of information by government agencies."*

Following this the statute states the "purposes." These recognize that specific exemptions are made (and these are found in subsections (j) and (k) of the statutes; to permit individuals to determine what records may be kept; permit individuals to gain access to their records; restrict the collection of information to lawful purposes; and subject the agency to civil suit if the government violates any rights of an individual.

Of major substantive importance here is the fifth stated "purpose" which provides:

> (5) permit exemptions from the requirements with respect to records provided in this Act *only* in those cases where there is an important public policy need for such exemption *as has been determined by specific statutory authority;* (Emphasis supplied.)

Subsection (a)(3) of the Privacy Act defines the word "maintain" as: "(3) the term 'maintain' includes maintain, collect, use, or disseminate."

There is absolutely no room for doubt that the government maintains, collects, uses, and disseminates DD Forms 1357, "old," "intermediate," or "new."

Subsection (a)(4) of the Privacy Act defines "record" as:

> "(4) the term 'record' means any item, collection, or grouping of information about an individual

> that is *maintained* by an agency, including, but not limited to his education, financial transactions, medical history, and criminal or *employment history* and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or a voice print or a photograph." (Emphasis supplied.)

There can be no doubt in the World that DD Form 1357 is very fairly included as "employment history", for it even details the jobs held. Insofar as "identification" is concerned, every retired regular officer subscribes his name to the form.

Subsection (e) of the Act is entitled, "Agency requirements."

As a fundamental tenet, the Circuit Court's approach was that these "requirements" were *permissive* in allowing an agency to proceed, *as opposed to being constraints* or restrictions on the agency.

It is quite easy to summarize the Circuit Court's opinion addressing these requirements:

> "So long as there is a statute setting out a function of a government agency; the agency collects information only from the individuals; and informs the individual of the authority, principal purposes, routine uses, and consequences of nondisclosure, the agency can ask any questions it wishes."

This short-shrift consideration of the statute would not have been so bad, had the Court not known that the vast majority of the DD Forms 1357 in controversy, and Commander Little's in particular, were absolutely void of the third requirement.

The Circuit Court totally misinterpreted the first of the three points.

Subsection (e)(1) states:

> "Each agency that maintains a system of records shall—
>
> (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order of the President."

What this means, of course, is that *unless* there is a specific statute or Executive Order of the President *authorizing* the agency to ask questions, the agency is prohibited from asking them.

This follows the "purpose" stated in subparagraph (5) of the "Purposes" set forth, *supra.*

To switch the syntax around as the Circuit Court did, is to ignore the basic fact that the Congress seldom enacts statutes addressing functions of federal agencies which the Congress does not believe are "relevant and necessary" to accomplish some purpose of the agency.

It is certainly not enough for agencies such as the Environmental Protection Agency, the Department of Housing and Urban Development, or the Department of Health and Welfare, simply because they are assigned innumerable relevant and necessary purposes and functions by the Congress, to use these enabling statutes as "authorities" to ask any kinds of questions which might satisfy the thirst for data to accomplish these functions.

When one crosses over into the criminal and quasi-criminal regulatory statutes, the tenets articulated by the Supreme Court in *Boyd* v. *United States,* 116 U.S. 616 (1886) come into play.

In *Boyd* the Court addressed instances in which questions might violate the Fourth Amendment, exclusively; or violate the Fifth Amendment, exclusively; and others which could violate both the Fourth and Fifth Amendments.

This is definitely the situation here. Appellants who are teaching school, or fishing off Florida simply have a right of privacy to be free from government "nosing" into what they are doing. Others, like Captain Field, have both a right of privacy, vis-a-vis his civilian occupation, since there are no "military aspects" involved, and it is also possible that his employment might be criminal in nature, and hence, requiring answers to the details of this employment, might tend to incriminate him . . . as it actually did, here.

As held in *Boyd,* the litigant is entitled to *both* protections, and certainly it would be a sad day if the Courts tried to set a precedent as to which right was most precious . . . the right of privacy or the right to be free from coercive self-incrimination.

On the contrary, it is the sovereign who must avoid invading the rights of the people. (Boyd, supra)

This is exactly what the sovereign has failed to do and the day of reckoning is now at hand.

Subsection (e)(1) of the Privacy Act, in *proper* syntax, states that *unless* the Congress by statute or the President, by Executive Order has authorized a gov-

ernment agency to ask individuals any *specific* questions that are relevant and necessary to the functions of the agency, these questions shall not be asked.

This simply removes from the initiatives of the bureaucrats the judgment on what information is relevant and necessary to the proper functions of their agencies . . . the evil to which the Congress had turned its attention in enacting the statute . . . and placed it in the hands of the Congress or the President.

Simply stated, if an agency requires information, it must appeal either to the President or the Congress for the "authority" to ask it. Hence, the government is not hamstrung, nor is it given an open sesame to ask questions.

There is nothing mysterious about this. Since the enactment of the Privacy Act, such common questions as asked by the Internal Revenue Service, are backed up by specific sections in the Internal Revenue Code, which, in accordance with the requirements of The Privacy Act are stated in tax collecting papers, with the citation to the specific sections of the Code.

As all high ranking government officials are well aware, the Ethics in Government Act, in requiring financial disclosures by members of the Legislative, Judicial, and Executive Branches, has carefully spelled out in the statute what questions can be asked these officials and their spouses.

And the Secretary of Defense is totally aware of this. The witness appearing at the June 2, 1977 "evidentiary hearing" before Judge Richey in response to a subpoena personally served on the Secretary of Defense, placed in evidence, (over Captain Field's counsel's objections as to relevancy and materialty), the

January 1, 1977 DD Form 1357. Once Judge Richey allowed this document into evidence, counsel asked numerous questions. Amongst them was a reference to the paragraph on the "new" DD Form 1357 which had never appeared before on any other form, to the following effect:

> "I will file a new Statement of Employment within 30 days after the information in this Statement has ceased to be accurate.[20] I understand that if I have been retired for less than three years and have been employed by a defense contractor, I might also be subject to the requirement to file a Report of DoD and Defense Related Employment (DD Form 1787) pursuant to 50 U.S.C. 1436 [21] and DoD Directive 7700.15."

Counsel showed the witness a copy of 50 U.S.C. 1436, which *specifically* spells out the questions the statute "authorizes" the Secretary of Defense to ask. The witness admitted he saw the difference vis-a-vis copies of 5 U.S.C. 301, 44 U.S.C. 3101, 37 U.S.C. 801(c), and 5 U.S.C. 5532, the four statutes "cited" as "authorities" on the various Navy DD Forms 1357 in evidence.[22]

---

[20] This statement is similar to prior "attestation" promises to up-date the information, and opens the retiree to trial under Article 133 of the Uniform Code of Military Justice for failing to keep his word as an officer and gentleman.

[21] 50 U.S.C. 1436 requires certain former officers and employees of the Department of Defense above the rank of Major or the grade of GS-13, who leave the Department and accept positions paying more than $15,000 per annum from defense contractors doing more than $10 million per annum in business with the Department, to submit statements of this employment, for three years after leaving the government.

[22] In *Hoker* the appellants presented other DD Forms 1357 from other military departments citing eight other statutes, as well as

It is obvious that the government is not going to admit it knows what the Privacy Act requires, insofar as the context of these controversies are concerned. The government has, and will continue to "stonewall" this issue, because they know the appellants cannot crawl into the minds of the various officers, employees, agents, and attorneys who are so stubbornly "defending" what is so obviously wrong.

On the other hand, the clear and convincing evidence is that this is a wrongful practice; an unlawful practice; and the various government personnel involved in perpetuating it, even if they choose to ignore Judge Richey's Orders of November 12, 1976, or to try to "work around" his injunctions issued on August 26, 1976 and November 12, 1976, are fully and totally aware, by every possible bit of evidentiary "fact" available in the hands of one litigant to use against another, of what this statute means, and how they are violating it.

And so long as the Courts indulge this obviously unlawful conduct, all the appellants can do is litigate against both the Executive Branch and the Judicial Branch, *in attempting to carry out the will of the Congress.*

The Circuit Court's second rule . . . quoting from subsection (e)(2), is another one of these kinds of quotations with which the appellants can find no argument, save that the interpretation given by the Court is the exact opposite to that intended by the Congress.

---

two Executive Orders of the President, and three departmental regulations . . . none of which have any "authorizations" in them to ask any questions.

The Congress did not mean to grant "permission" to government agencies to ask questions of individuals. Its intent was that *if the government were authorized to ask questions,* then they should ask them, insofar as possible, *only* from the individual.

This obviously is to avoid hearsay evidence on the government records insofar as that is possible, and to give the individual the right to state the facts as the individual sees them, and not as someone else might perceive them to be.

The Court's third, and final rule, addresses subsection (e)(3) of the Act. Obviously, from the facts before it, the Court could not apply this subsection to any of the "old" DD Forms . . . so the Court "vitiated" these old forms by fiat, *in the face of the direct evidence before them that the "old" DD Forms 1357 are still being maintained, used, and disseminated by the government, to this very day.*

The word "authority" crops up, again, in subsection (3)(e). The government agency must state the "authority" it has to ask the questions.

Again, this is a simple "fact." But certainly a government agency simply cannot cite any statute addressing any assigned function, and still meet the meaning of the word "authority."

In context, the Secretary of Defense *may* have the "authority" to impose the penalty forfeitures that can stem from the enforcement of 37 U.S.C. 801(c). But it does not follow that because he has the "authority to enforce" that he has the "authority to ask questions."

Otherwise, the Secretary of Defense could choose from amongst the hundreds of defense-related statutes, spelling out the exercise of the legislative powers over the land and naval forces, and armed with the "duty and responsibility" of carrying out these statutes, and the requisite "authority", ask any kinds of questions desired.

And obviously, there is nothing "sacrosanct" about 37 U.S.C. 801(c). It is merely another statute involving an admittedly "non-military" function of the Department of Defense . . . and in context, all the evidence indicates that it is now cited as a pure subterfuge to avoid attacks that the "new" DD Form 1357 is coercively self-incriminating, by avoiding citing the analogue statute (as the government describes the two statutes in their "defenses") 18 U.S.C. 281.

Obviously, simply by citing an "authority", a "principal purpose" a "routine uses" and a "Disclosure" a governing agency cannot circumvent the constraints in the Privacy Act.

The law requires that the government agency must disclose these elements, but does not give it a license, merely because it follows the required *format,* to run roughshod over the *substantive* rights of privacy of individuals.

The Circuit Court shows its "awareness" of this in trying to vitiate the "old" DD Form 1357 as being "mandatory." But, suppose the "new" DD Form 1357 also said disclosure was "mandatory"? This satisfies the requirement that the "Disclosure" be made, but certainly doesn't make the questions comply with the Privacy Act.

This Court has before it some "very bad law", articulated by the Circuit Court of Appeals for the District of Columbia Circuit in its first consideration of this extremely important statute.

The Circuit Court has turned the constraints of the Act intended by the Congress to be imposed on government agencies, into a broadside permission to agencies to ask questions to their heart's content, so long as they can dredge up a statute addressing a relevant and necessary function of the agency as established by the Congress or the President; collect the answers from individuals insofar as practical; and place on the questionnaire any text desired, so long as it claims to reflect the authority, the purposes, the routine uses, and the consequences of disclosure or non-disclosure.

None of the *substantive* rules, at all, need be followed, so long as the "*form*" is followed, and this is a gross judicial error.

REMEDIES

The government knows that this is as "bad law" as the appellants.

The appellants have had to drag from recalcitrant government witnesses the admissions that agree with the appellants' contentions and allegations that the government knows that it is violating the Privacy Act.

Admiral McDowell was fully aware of Judge Richey's Orders when he refused to discuss Commander Little's problem with counsel on February 11, 1977. Counsel had directly informed the officials at the Navy Accounting and Finance Center and the Navy Finance Center of these Orders. Indeed, on June 2, 1977, the government witnesses stated that they *knew* they were

wrong vis-a-vis all DD Forms 1357 issued prior to January 1, 1977. Yet, the evidence is beyond a shadow of a doubt that despite this admitted knowledge, these Forms are still being used.

The "refuge" was found in Judge Richey's refusal, by his Orders of June 17, 1977, narrowly addressing the single issue as to whether, in Captain Field's case as of November 12, 1976 the government had willfully or intentionally violated the statute; and in Judge Richey's subsequent refusal to require the government to show cause why they should not be cited for contempt for dunning Captain Field during July and August of 1976 to submit Statements of Employment.

Neither Order addressed the issues, per se . . . either by implication or direction, because the Courts are misstating facts the government *knows* are false, and "finding law" from these facts.

Yet "armed" with these Orders, the government has stubbornly continued to do what they admitted, prior to the June 17, 1977 Order, was wrong and unlawful.

The Congress frowned on this in two ways in The Privacy Act.

First, in subsection (i), the Congress provided criminal penalties for willful or intentional violations of the Act.

The Attorney General knows this. The United States Attorney for the District of Columbia knows this. It is the law of this Nation, and they are charged with this knowledge.

But they also know this because the Attorney General is a named defendant in Field, and the United

States Attorney for the District of Columbia has been "defending" his clients.[23]

In the numerous context of anachronisms here, it turns out that the Attorney General is *not* performing his function to enforce the statute, because he has been too busy "defending" the officers, employees, agents, and attorneys under the Secretary of Defense who have been violating the statute.

Obviously, the appellants cannot prosecute government officials under subsection (i) of the Act.

But the Congress gave all individuals the right to seek civil remedies under subsection (g) of the Act.

In its Legislative History, set forth in the appendix here as "Civil Remedies", the Congress made no bones about the power it intended to give individuals. It specifically addressed certain cases in which the Supreme Court had imposed rather severe constraints on litigants, stating that specifically, the Congress did not intend these to stand in the way of individuals seeking remedies under the Privacy Act. (See Appendix 71a.)

The Congress stated that complaints brought under this statute are brought "in the public interest."

Indeed, the Congress states that if the individual cannot muster the means to support a suit, himself, the Attorney General should do this.

It *does* cost money to "litigate" against the sovereign. The more than 280 Docket entries in these controversies attest to how much it costs determined liti-

---

[23] This naming of the Attorney General was to obviate a "defense" to 18 U.S.C. 281 on grounds that Captain Field had not involved all government parties in his complaint. Little and Hoker did not sue the Attorney General.

gants, who simply will not give up, to keep his controversies alive.

And the Congress stated that these litigants who succeed in their public duty to enforce this statute shall, at the very least, be paid their costs and reasonable attorney's fees.

Then the Congress goes on to address the aggravated case in which the government agency willfully or intentionally violates the statute, and provides that, in addition to costs and fees, "damages" shall also be assessed against the United States . . ." actual damages, but no less than $1,000.00."

And this language is adopted as the Congress recognized how difficult it might be to prove specific damages, and stated its intent to remove this barrier from the road of individuals litigating "in the public interest."

What happened in Captain Field's case was that Judge Richey refused to grant even costs and reasonable attorney's fees . . . even going out of his way to state in his June 17, 1977 Orders that Captain Field had not requested such costs and fees, when, in compliance with Judge Richey's pre-trial Orders preceding the June 2, 1977 hearing, *Captain Field's counsel had personally handed this claim to Judge Richey's Clerk in Judge Richey's Chambers,* in May.

On re-submission of the claim, Judge Richey simply ignored both the fact of pre-delivery, and the post-Order petition.

This error was simply part of the growing package of errors then indulged by the Courts. Judge Richey's error was taken as accepted "precedent" without any

argument or discussion by the Courts, even though Captain Field had appealed this error, and it was Appeal Number 78-1336 pending before the Circuit Court of Appeals.

The only analogy the appellants can think of in "encapsulating" this situation is that the Emperor stands bare naked in a "legal sense" in front of the Courts, maintaining that he is fully clothed, because certain officers, employees, agents, and attorneys who know they are violating the statute, have told the emperor that his actions are clothed in "legality."

The appellants are all entitled to costs and reasonable attorney's fees, because that is what the Congress has provided by subsection (g) of the statute.

The appellants are also entitled to damages, and do not claim any amounts in excess of $1,000.00 each, because the government agency knows full well, and the evidence is irrefutable, that it is willfully and intentionally violating this statute, and has continued to do so, merely because they have been able to so confuse the lower Courts that they seek refuge behind their own confusion. This is addressed in subsection (g)(4).

To deny these remedies will emasculate the Privacy Act. It will teach no lessons to any government agencies, as the "precedent" set by the Courts will be a refuge behind which any violations of the statute may hide.

Again, because the Congress could not possibly anticipate all the ways and means a government agency might find to violate the statute, one can become involved in parsing out the syntax of subsection (g) providing these "Civil Remedies". The subsection can be rendered meaningless to the litigant, in direct con-

travention to the stated intent of the Congress, by simply "torturing the syntax" out of all context as the Circuit Court did in addressing subsection (e). However, the Legislative History clearly shows that the Congress was *encouraging* the litigant, *not protecting* the government, and in that context, the syntax is reasonably clear to an unbiased mind.

The Circuit Court of Appeals simply ignored subsection (g), despite its acknowledgement of the existence of Judge Richey's Orders on November 12, 1976, *and the obvious fact that "violations" of law occur when they occur, and while the law breaker may, by subsequent actions mitigate or aggravate the situation, the fact cannot be changed by subsequent recantations, or changes in "policies and practices"* as the government so convinced Judge Richey on June 17, 1977, despite the documented facts that neither the policies or practices had changed one bit, to this day.

Indeed, the "new" DD Form 1357 may have been promulgated in "good faith" on January 1, 1977 as the government assured Judge Richey on June 2, 1977 . . . and had not the evidence in the cases of Commander Little and Captain Hoker, submitted after January 1, 1977 and before June 2, 1977 been so obviously in conflict with this "good faith" defense the excuse might have mitigated the violation vis-a-vis Captain Field.[24]

This Court can readily approach the Privacy Act, *de novo*. The situation is continuing. DOD 5500.7 has

[24] Again, the recurring "problems" of the appellants are seen. The Courts have simply allowed the government to argue both sides of the issue, or when the appellants have forced sworn admissions from the government, the Courts have accepted the government's averments that are completely the opposite of their admissions.

not been changed one bit since the inception of these controversies. None of the viable and salient protective statutes have been changed one bit. None of the "constraining statutes" have been repealed, and only one, 18 U.S.C. 207 has been amended, and in that case, the coverage was broadened extensively, not curtailed. The questions on DD Form 1357 have not been changed, save for adding the question defining the offense denounced by 18 U.S.C. 281 and 37 U.S.C. 801 (c), and requiring an attestation and an explanation if the attestation is in the affirmative.

In short, the government has done nothing save exacerbate their violations. They know the Circuit Court was wrong, because they know, and indeed control, the true facts, and cannot be misled by the Circuit Court's adoption of "facts" the government knows are untrue.

The Circuit Court must be reversed, here. It has committed grievous error, emasculating a very important statute.

COERCIVE SELF-INCRIMINATION

The basic theory of coercive self-incrimination articulated by Captain Field was, that if 18 U.S.C. 281 is a valid criminal statute, and certainly, without doubt 18 U.S.C. 207 is, then any question asked Captain Field by the Secretary of Defense, for the sole purpose of ascertaining whether Captain Field was violating these, or other statutes involving his civilian employment, were incriminating.[25]

[25] This was the basic reason why Captain Field, through Admissions and Interrogatories elicited the sworn statements of the government that no "military purposes" whatever, were served by the questions.

Captain Field then contended, that since he was a person subject by 10 U.S.C. 802(4), to the Uniform Code of Military Justice 10 U.S.C. 801, *et. seq.*, he had a right, under Article 31, (10 U.S.C. 831), of the Code to remain silent, and the government had a *duty* to warn him of his rights as a *condition precedent* to asking any potentially incriminating questions.

Captain Field then contended that he was under compulsion to submit Statements since under Article 92 of the Code, he could be assigned such punishment as a court-martial might adjudge if he failed to submit the Statement of Employment; could be assigned such punishment as a court-martial might adjudge under Article 107 of the Code for submitting any false, incomplete, or misleading statements; could be assigned whatever punishment a court-martial might adjudge under Article 133 of the Code for failing to follow-up on the attestation placed on his original Statement of Employment for failing to keep his word as an officer; and could be assigned whatever punishment a court-martial might adjudge if the information submitted indicated that he had violated any criminal or other statute denounced by either a state or a Federal criminal code.[26]

---

[26] See *Hooper* v. *Hartman*, 163 F. Supp. 437 (D.C. Cal.), 247 F.2d 429 (C.A. 9, 1960), 161 Ct. Cl. 151 (1964), *certiorari denied*, 377 U.S. 977 (1964), in which an officer, retired for over eight years, was observed through the window of his private residence in San Diego, California, committing an act prohibited by the California Criminal Code, with a person having no connection with any military service. Hooper was arrested by military authorities, arraigned, tried, and convicted by court martial for the offense, and sentenced to dismissal from the service. In addition to the above citations, all of which attacked the viability of court martial jurisdiction over the accused, Hooper also was accorded two hearings before the Court of Military Appeals. All of the Courts upheld the jurisdiction over retired regular officers.

Further, the wording of the DOD 5500.7 then current, (as it still does) used the mandatory verb "shall" over the signature of the Secretary of Defense, adding an additional degree of compulsion, in accordance with the customs, traditions, and usages followed by citizens who serve the Nation under solemn oaths to support and defend the Constitution and laws of the Nation, and to question orders only in cases in which the individual was willing to risk his entire career.[27]

Captain Field was not aware that had he not submitted his initial Statement of Employment within thirty days of his retirement, he would have received a series of letters from the Navy reminding him of this obligation, and eventually, the final letter would state that his retired pay would be stopped if he did not submit a Statement of Employment.[28]

Nor was Captain Field aware that after January 1, 1977, the DD Form 1357 would state that, "If the information is not provided, further investigation will ensue which may lead to the withholding of retired pay and the referral of the matter to the Comptroller General of the United States or other Federal agencies."[29]

---

[27] This offense is recognized under Article 133 of the Uniform Code of Military Justice.

[28] This information was developed by appellants in the *Hoker* case.

[29] This typifies a major problem encountered by the appellants. The government continually "traded one wrong for another." The Courts, instead of perceiving that once a wrong has been done, it was a final act, would deny relief to the appellants, who then had to carry the burden of proving the substituted "wrong" was as bad as, or worse than, the terminated wrong. By changing words and phrases, after the fact, the government always had a new "defense."

THE DISTRICT COURT ORDERS

On August 26, 1976, Judge Richey addressed the issue of coercive self incrimination as perceived by Captain Field. Judge Richey stated:

> "It is hard for this Court to imagine a more direct way of asking the plaintiff to supply information that would have a 'direct and unmistakable consequence of incriminating' him under 18 U.S.C. 281. See *Marchetti* v. *United States*, 390 U.S. 39, 49 (1968)."

Judge Richey then stated "Thus, the critical issue before the Court is whether or not the plaintiff is compelled to complete DD Form 1357."

Judge Richey then addressed the compulsion of Article 92 of The Uniform Code of Military Justice, and the government's "defense that it was 'uncertain' whether the failure to complete the form would have sufficient 'service connection' ".[30]

Judge Richey denied this "defense" by citing *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1969), in context that persons should not have to wait for prosecution for the adjudication of their self-incrimination claims.

The second "major" defense, was a suggestion by the government that Captain Field lacked standing to sue since he could always resign his commission.

[30] This is typical of the conflicting kinds of "defenses" consistently used by the government throughout these controversies. Having "won" on the jurisdictional concepts in *Hooper,* the government was arguing against their own "victory." The appellants had no particular problems in pointing out these inconsistent defenses, but in the majority of rulings, the Courts simply chose that defense which supported the government's particular choice of argument on the issue at hand.

The Court concluded that this would exact a "price" from an individual as it were, to exert his claim that the questions were coercively self-incriminating.[31]

The Court then went into a discussion of the application of certain registration statutes against such professionals as lawyers and architects, and conciuded that the "penalty" vis-a-vis coercion was not confined to mere fines or imprisonment, citing *Spevack* v. *Klein,* 385 U.S. 511 (1967) quoting from *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).

Finally, Judge Richey held that the precedent of *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973) was controlling as part of the general development of the Supreme Court's trend in cases.

Judge Richey then enjoined the Secretary of Defense and the Secretary of the Navy, and all of their officers, employees, agents, and attorneys in the premises.

The government did not appeal these Orders.

The government, in fact, obviously didn't pay any attention, at all to what Judge Richey had held.

They did try, by re-issuing DD Form 1357 on January 1, 1977 to circumvent Judge Richey's specific addressing of 10 U.S.C. 892 . . . Article 92 . . . of The Uniform Code of Military Justice. The "new" Form bears this statement:

> "Disclosure of the requested information is voluntary in the sense that no criminal penalties will follow from failure to file."

[31] Oddly enough, the government had prevailed previously in these "defenses" on the only other attack ever brought against DD Form 1357 as being coercively self-incriminating. See discussion of *Taussig,* infra, which Judge Richey followed in dismissing Captain Field's complaint attacking 18 U.S.C. 281.

It is difficult to find an "analogy" to this in our law. It is similar to taking one sentence, out of context, in the *Miranda* rule, and claiming that since the accused has been warned of one right (i.e., one element of coercion has been removed), it is perfectly all right to use all the other coercive means at the disposal of the law enforcer.

Of course, the appellants firmly believe that, as *a matter of law,* the government has been in contempt of Judge Richey and the Courts of this Nation ever since a reasonable time elapsed after August 26, 1976 during which the Secretary of Defense could have laid DD Form 1357 to rest.

This is firmly established law *even* if Judge Richey had ruled incorrectly.

> "An injunction duly issuing from out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon parties therein within the jurisdiction, must be obeyed by them, however erroneous the action of the Court might be, even if the error be in the assumption of the validity but void law going to the merits of the case. "*Howat* v. *Kansas,* 258 U.S. 181 (1922)."

And, the law is relatively simple in all other respects. "Jurisdiction to punish for contempt attaches upon the commission of the offense." *Ex parte Terry* 128 U.S. 289 (1888).

But, of course, the "trouble is" that although a litigant can prove contempt, and the Court has clear jurisdiction, *unless* the Court is willing to enforce its own Orders, then the litigant holding the advantage of the Order has no recourse.

And this is exactly what happened here. Captain Field, after patiently waiting to see if Judge Corcoran,

in Commander Little's case would address the issue, finally brought his own Motion to Require the Defendants to Show Cause Why They should not be Cited for Contempt, on the only grounds then available to Captain Field . . . the existence of the January 1, 1977 DD Form 1357, and the dunning notices he had received from the Navy.

Commander Little was in the right Court, but before a different Judge, and his complaint solely revolved around the same DD Form 1357 current when Judge Richey handed down his Orders on August 26, 1976.

Commander Little also prevailed, finally, on May 15, 1978, but failed on the Privacy Act.

Meanwhile, Captain Field was "litigating" his appeal from Judge Richey's refusal to cite the government for contempt, and this appeal was dismissed *sua sponte* without opinion, by the Circuit Court of Appeals on May 31, 1978.

Yet, oddly, standing before Judge Corcoran, Captain Hoker did not prevail in his attacks on DD Form 1357, when Judge Corcoran on January 19, 1978 had found the Form was *not* coercively self-incriminating.

Judge Corcoran did this through exercising the propensity of the Courts to adopt "facts" which led to the conclusion reached, whether the facts were valid or not. In this instance, Judge Corcoran stated that Captain Hoker had attacked only the "new" DD Form 1357, and since Judge Richey had refused to grant Captain Field and costs, fees, or damages because Captain Field had been unable to prove the violations in his case were willful and intentional, and had refused to require the government to show cause why they should not be cited for contempt in continuing to

dun Captain Field for Statements of Employment, that he found that the January 1, 1977 DD Form 1357 was not coercively self-incriminating.

Captain Hoker moved for reconsideration, pointing out that his complaint had attacked "all" DD Forms 1357, of whatever vintage. Judge Corcoran dismissed this Motion for Reconsideration, without opinion.[32]

For litigants armed with as many indisputable facts . . . indeed, facts which rely 100% solely on the *other* litigant's own documents, and on issues finally decided without appeal against the other litigants, to find themselves in this kind of "legal" situation is very unsettling. They can find no precedent for Courts ever doing anything like this before . . . and hence, can find no reason other than the courts have acted in a totally unlawful and totally biased manner.

THE CIRCUIT COURT'S OPINION

Unfortunately, the Circuit Court did even worse.

It specifically refused to follow either *Marchetti* or *Albertson* cited by Judge Richey on August 26, 1976.

It then proceeded to make basic assumptions which simply were not true, and which the record showed were not true.

The Court *assumed* that because Judge Richey had enjoined the government on August 26, 1976 that the government had stopped using these "old" DD Forms

Yet the Court had directly in front of it Commander Little's October 22, 1975 DD Form which the JAGN had used on February 4, 1977 as a basis of his letter which triggered the *Little* controversy, and as

[32] The Circuit Court did straighten out this particular "fact."

the record showed, had been used by NIS in August and September of 1977 at the behest of the Comptroller of the Navy as the basis of two more investigations into Commander Little's employment activities, and finally had been used for further determinations by the Commander of the Navy Finance and Accounting Center, Washington, and the General Counsel of the Navy in early 1978.

There was further *direct* evidence on the record stating that there had been absolutely no instructions issued by the Secretary of Defense subsequent to August 26, 1976 concerning restrictions on any further use of DD Forms 1357 issued prior to that date, and a statement from the military department submitting the letter that it would certainly use the information on these forms if it was indicated, on review, that the retirees had violated 18 U.S.C. 281.

This is terribly frustrating to litigants, so the Petitioners have walked through all this again, and present in the appendix, even more up-dated statements from the military departments. (Pages 75a to 84a, Appendix C.)

Vis-a-vis "compulsion" as our law views it in protecting citizens, the only "element" removed is possibly the threat of court-martial, although obviously, this is a decision resting solely with the government. They can change this overnight.

As a trade-off, the threat of investigation is now stated as a positive threat, using the term ". . . an investigation will ensue . . .", and to really make this so much worse, the "new" DD Form 1357 now sets forth the definition of selling addressed by 18 U.S.C. 281 and 37 U.S.C. 801(c), and requires an attestation

as to whether or not the retiree is violating this definition, and if so, a further explanation!

Those are just simple, straight-forward documented facts.

The Circuit Court ignored all this, and "turned" their decision on the "fact" that submission of the "old" form was "mandatory," and this was no longer the case.

This is ellipitical reasoning at its worst. Judge Richey, *at no time* used the word "mandatory." Indeed, the *only* evidence that any military activity *ever* said the submission of the "old" DD Form 1357 was "mandatory" appears in the detailed "Privacy Act Statement" set forth in footnote 14 of the Circuit Court's opinion. This, as noted was issued in November of 1975 by the Fourth Naval District . . . and the Circuit Court had before it two "Privacy Act Statements" issued by JAGN in January of 1976 which stated that submission was "voluntary." (fn. 12, *supra.*)

Again, this "picking and choosing" from amongst the various government documents is a mischief indulged consistently by the government. This November 1975 "Privacy Act Statement" was introduced in the June 2, 1977 evidentiary hearing in Field, again over the strong objections of counsel as to its relevancy and materiality since the government admitted that Captain Field had never seen it until the morning of June 2, 1977. Judge Richey admitted it . . . and it became just another "fact" on which all this dismal "law" is now based.

In the final analysis, the Circuit Court then articulated a totally unique new concept of self-incrimination, which is extremely dangerous.

The rationale, from actually reading the cited cases, was that since the Supreme Court had upheld a state's Motor Vehicle Code requiring drivers after an accident to report the accident, and addressing more of a "regulatory" statute than criminal statute, *California* v. *Byers,* 402 U.S. 424, that the dicta of the Court on page 430 of *Byers* noting that statutes requiring registration by "highly selective group(s) inherently suspect of criminal activities" were unlawful, that since retired regular officers were of "a distinguished and honorable class", they were not entitled to the same Fifth Amendment protections as were given in *Marchetti* and *Albertson,* supra, or in *Leary* v. *United States,* 395 U.S. 6 (1969) where the registration requirement for marijuana taxes was struck down, did not apply!

Very simply, the appellants believe they have, at least, the *same* rights as gamblers, subversives, and dope peddlers, and certainly, the Fifth Amendment of the Constitution does not read, "No person, except retired regular officers shall . . . be compelled in a criminal case be a witness against himself . . . ."[33]

The Circuit Court then committed one of the gravest errors that the appellants can believe a Court could commit.

After segregating the appellants as a "distinguished and honorable class" from "highly selective group(s) inherently suspect of criminal activities," used the analogy that retired regular officers were like taxpayers filing their returns, "most of whom do not run the risk of incriminating themselves."

---

[33] And this same principle applies, *infra,* to "due process."

Can one imagine the Internal Revenue Service, citing the Internal Revenue Code as "Authority," stating that its "Principal Purposes" were to enable IRS agents to determine whether taxpayers were in compliance with statutes and regulations prohibiting certain practices, and that the "Routine Uses" would be used for "law enforcement purposes," sending out a questionnaire to all taxpayers asking them to name their employer, their employer's products and services, their title, and their duties . . . and to attest to whether or not their activities violated sections of the Internal Revenue Code which were set out for them to respond to?

The appellants are certain that the Courts would strike this down out-of-hand even though the Internal Revenue Service assured the taxpayer that no criminal penalties would follow from his failure to file the form, although an investigation will ensue if he does not.

This is exactly a direct paraphrase of DD Form 1357 as issued on January 1, 1977.

The "defense" available by the Internal Revenue Service would be *"Field* v. *Brown, et al,"* since taxpayers, like retired regular officers are not in a class inherently suspect, as opposed to persons who are inherently suspect of criminal activities.

Obviously, the appellants are "up in arms," but they believe they have every right to be. They view, without reservation, this opinion of the Circuit Court of Appeals as being an outrage to all the precepts of our judicial system.

The appellants tried, on Petition for Rehearing to have the Court reconsider this kind of mischief. The Petition fell on deaf ears.

This Court has a duty to reverse this opinion, as setting a precedent which so flagrantly violates the Fifth Amendment as to alarm this Court.

CONTEMPT

The appellants firmly believe that this Court, since it has the inherent jurisdiction to do it, must hold the government in contempt of the judicial system of the Nation.

The evidence is overwhelming that the various officers, employees, agents, and attorneys of the Secretary of Defense involved in this miserable kind of advocacy, and the United States Attorney who not only sanctioned it, but "pleaded" it, should be openly criticized for their contempt, if not brought to the bar of justice for punishment.

The government should also be required to pay the reasonable costs and attorney's fees which, by any mere scanning of the voluminous records before this Court, had been a tremendous burden on the appellants and their counsel.

No matter what the degree of "suspicion" and "conviction" that retired regular officers might be prone to "peddle their influence" or become participants in some "sinister military-industrial complex", or exploit an "old buddy system" to their financial advantage after they have laid their uniforms aside, that might be rife in certain sectors of our society . . . and as shown by the government's pleading and a Con-

gressional document on the record . . . they are entitled to the "equal protection of the law," and the "equal justice under law."

That these suspicions are totally without foundation is admitted by the government (in their usual posture of speaking out of both sides of its mouth)[34] and the record of "enforcement" of the statutes at issue here, or any criminal statutes denounced by the United States Code"[35] is basically nil . . . a fact, considering that literally "millions of retired regular officer man years" have now passed, is a tribute to what the Circuit Court has stated was "a distinguished and honorable class."

SUMMARY OF DD FORM 1357

In basic summary, DD Form 1357, in whatever "format" or "context" violates both The Privacy Act of 1974, *and* the Fifth Amendment.

These rights are entirely separate, as this Court so exquisitely explained in *Boyd, supra.*

The law of contempt is quite simple in the premises.

Courts have the power to punish in a summary manner, the disobedience of any party to any lawful writ, process, order, rule, decree, or command of the Court. *Eilenbecker, supra.*

---

[34] In its Appeal Brief, the government used the phrase, "conflict of interest" no fewer than fourteen times, and sprinkled their argument with "influence peddling" and "undue influence" in "justifying" to the Courts the viability of 18 U.S.C. 281 and 37 U.S.C. 801(c).

[35] The commission of a retired regular officer is automatically terminated on conviction of a crime denounced by a Federal statute. Even if the conviction is reversed on appeal, the retiree still loses all of his military benefits.

The Court may proceed upon its own knowledge of the facts, without further proof, and without issue or trial in any form to punish contempt committed directly under its eye or within its view. *In re Savin,* 131 U.S. 267 (1889).

Jurisdiction to punish for contempt attaches upon the *commission* of the offense. *Ex parte Terry, supra.*

An injunction duly issuing from out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon parties therein within the jurisdiction, must be obeyed by them, however erroneous the action of the Court might be, even if the error be in the assumption of the validity but void law going to the merits of the case. *Howat, supra.*[36]

The government obviously stands in contempt of the District Courts and the Circuit Court of Appeals . . . which simply have leaned so far over backwards to work the government's "defenses" for them, that they became blind to their *primary* duty of enforcing the law of this Nation, vis-a-vis permanent injunctions, unappealed by the government, and blatantly violated.

This same evidence is now before this Court. *The government has not backed down an inch since all this mischief started.* This Court has an inherent power to enforce the laws of this Nation, even when the lower Courts will not. Indeed, this Court has the specific power to oversee all proceedings in the lower Courts,

---

[36] *Howat* is again cited here, not to argue that there was anything erroneous in Judge Richey's rulings, but to indicate that the Supreme Court takes a very severe view of the contempt of court when it occurs.

and if these Courts fail to do their duty, to execute the judicial duty itself.

The litgants here have come along a very difficult, hazardous, and frustrating road . . . in the face of consistently inconsistent defenses set up by the government; consistent failures of the government to plead and plead properly; consistent overt violations of permanent injunctions handed down by the District Courts; and a woeful cynicism which has apparently grown from a recognition that the lower Courts are going to work the government's cases for them if the government does not.

Honest citizens stand before the Court . . . proud of their service to their Nation, and proud of their staying power as litigants to force the government into lawful acts. It has been damnably costly in rendering these services to the public.

The appellants Field and Little will never again be "whole" for they have quaked in the fear of criminal penalties, and a penalty forfeiture of tremendous magnitude . . . $30,000.00 . . . for which there is no "legal" remedy. Numerous appellants in *Hoker* have suffered from the same fears for their personal security.

These citizens, therefore, should be made as "whole" as this Court can make them . . . to at least the extent that the tremendous costs and fees involved here, are paid by the gross malefactor which has caused all this mischief . . . unfortunately, but truthfully, the United States government, through the unlawful acts of various officers, employees, agents, and attorneys.

This may well cost the United States dearly . . . but the appellants believe that the costs in freedom, and

future respect for the law of the Nation which is implicit in requiring the government to pay the costs of this litigation, will be money well assessed in the interests of our proud democracy.

37 U.S.C. 801(c) AND 18 U.S.C. 281

HISTORICAL DEVELOPMENT

37 U.S.C. 801(c) and 18 U.S.C. 281 constrain certain post-retirement "selling" activities by retired regular officers of the armed forces.

These statutes have been subjected to a considerable "administrative" debate over the years, but are very seldom "enforced" by the imposition of penalties.

In the entire history of the paragraph 18 U.S.C. 281 in controversy here only one criminal trial (an indictment for conspiracy to violate the statute) has been held. In this case, the retired officer and his employers were convicted in the District Court, but the conviction was overturned because the trial judge failed to properly charge the jury. (*United States* v. *Gillilan, et al.*, 288 F.2d 796 (2d Cir. 1961). The case was not retried.

The "enforcement" of 37 U.S.C. 801(c) has rested with various officers in the military departments, who, on occasion, request affirmation of their opinions from the Comptroller General of the United States.[37]

---

[37] In the *Little* case, the first opinion that Commander Little had violated the statute was recordered by JAGN. Subsequently, JAGN transferred "cognizance" to the Navy Comptroller, who as the record shows recently rendered an opinion in the case of Captain Robert R. Clement, U.S. Navy. In the case of Commander Little, however, the Navy Comptroller then transferred the case to the Commander, Navy Finance and Accounting Center, Washington, D. C. (who had originally requested the JAGN opinion), and on

The general history of these statutes is quite complex.

Section 113 of the Criminal Code, which became the first paragraph of 18 U.S.C. 281 (1976) was first enacted in 1862 to preclude the payment of compensation to Members of Congress *and other officers and employees of the government* for representing persons before government agencies.

As shall be seen, it was not until 1939 that this statute was applied to retired officers.

The first forerunner of 37 U.S.C. 801(c) applied only to retired Navy and Marine Officers. This was enacted as part of the Naval Appropriations Act of 1896, and actually forbade retired Navy and Marine Officers from accepting any employment from companies doing business with the Navy.[38]

The second forerunner of 37 U.S.C. 801(c) was enacted in 1926, and prohibited the payment of retired Army officers who represented any person in the sale of supplies or war materials to the Army, for a period of two years, after retirement.[39]

---

the second time around, the Commander asked for an opinion by the General Counsel of the Navy.

[38] Rear Admiral Meade, U.S. Navy (Retired) had replaced the son-in-law of Senator Shephard of the Naval Affairs Committee in his job at Bethlehem Steel Company, as an expert in case-hardened steel armor plate.

[39] This is commonly known as a "Harbord Amendment" after General Harbord of the Army who "opted" to take advantage of a post World War I retirement statute allowing officers with thirty years of service to request retirement. General Harbord was only fifty-eight, and requested retirement, and accepted employment with the Radio Corporation of America.

In 1935, the 1896 ban on retired Navy or Marine Officers working for Navy contractors was lifted, and in its place, a statute paralleling the Harbord Amendment was enacted, save that it provided a "life time" prohibition on receiving retired pay for representing any person in the sale of supplies or war materials to the Navy as opposed to the two year period of the Harbord Amendment.[40]

When the United States Code was codified, the "Army" statute became 5 U.S.C. 59(c) and the "Navy" statute became 10 U.S.C. 6112b.

In turn, both statutes were repealed in 1962, and a new statute, 37 U.S.C. 801(c) as it stands on the statute books, today, was enacted.

Insofar as 5 U.S.C. 59(c), there is no history that it was ever enforced prior to its repeal in 1962.

Insofar as 10 U.S.C. 6112b is concerned, the first instance of its enforcement occurred in 1958, when Lieutenant Commander Ronald Anthony was held to have been "selling beer" in Norfolk, pursuant to his job as a public relations employee of a beer company. (38 Comp. Gen. 470, 1958).

---

[40] This statute was referred to as the "McNamee Statute". In 1934, a group of industrialists had formed a conglomerate of small companies which they wanted Admiral Luke McNamee, U.S. Navy (Retired) to head. They had tentatively named the company "The Admiral Corporation." When the 1896 statute was considered, it was impossible to carry out the plan, since one of the component companies had Navy contracts. An appeal was made to the Congress, and the 1896 statute was amended. Admiral McNamee then became the President of what is still known today as The Admiral Corporation.

The next instance of enforcement was against Chief Warrant Officer Seastrom, U.S. Navy (Retired).[41]

This is apparently the only time either 10 U.S.C. 6112b, 5 U.S.C. 59(c), or 37 U.S.C. 801(c) has been addressed, as such, by the Courts prior to the *Little* controversy.

Seastrom did not attack the statute. The theory of his case was that it was wrong to take his pay away under the circumstances, and the opinion of the Court of Claims turned on their statutory interpretation of the effects of the retroactive clause in the "beneficial" legislation which Seastrom had taken advantage of.

The second paragraph of 18 U.S.C. 281 which is in controversy here was enacted in 1940. The Legislative History, at JA 62 of 76-1781, shows that this was enacted specifically because of the holding of the Court of Appeals for the District of Columbia Circuit in

[41] Seastrom had left active duty as a retired enlisted man (Chief Petty Officer). However, the Congress enacted a statute which allowed retired personnel to choose whether or not to retire in the highest "temporary" grade or rank held on active duty. Seastrom, having served temporarily as a Chief Warrant Officer chose to retire with that rank. The statute dated this retirement retroactively to the date of leaving active duty.

Prior to opting to be retired in the advanced rank, Seastrom had been employed as a pharmaceutical salesman, representing his employers, *inter alia* in Naval Hospitals. When he attained the rank of Chief Warrant Officer, the Navy held that since his commission was retroactive, Seastrom was not entitled to receive his retired pay during the interim period when he held the grade of Chief Petty Officer.

Seastrom sought relief in the Court of Claims, and lost. *Seastrom* v. *United States,* 147 Ct.Cl. 453 (1959).

Morganthau v. *Barrett,* 71 U.S. App. D.C. 148 (1939), *certiorari denied,* 309 U.S. 622 (1939).[42]

In 1940, the Congress amended section 113 of the Criminal Code by adding the paragraph now in controversy.

Since then, a considerable "administrative battle" has raged over this statute internally in the military services. Some "authorities" maintain that it was never intended to be a criminal statute, but was intended to preserve 5 U.S.C. 59(c) and 10 U.S.C. 6112(b). Others disagree.

The "concensus" today, is that this was intended to be a criminal statute, and imposes a lifetime ban on retired regular officers representing any person in the sale of anything to their former services.

Insofar as the appellants are concerned, obviously they must accept this pronouncement of the sovereign, since it is obvious the power of enforcement lies with the sovereign. *The appellants do not believe this was ever intended to be a criminal statute, however.*[43]

[42] The appellee, Barrett, had been retired from the Army in 1920 for physical disability. He had become an attorney. In 1938 he came to Washington to represent a client before the Treasury Department. He was barred from doing this by the Secretary of the Treasury on the grounds that a retired officer was "an officer of the United States", and hence, barred by Section 113 of the Criminal Code from representing any person before any government agency.

Barrett sought a mandamus in the United States District Court for the District of Columbia, and won. The government appealed, and Barrett lost in the Circuit Court of Appeals.

[43] Neither does JAGN. OpJAGN JAG:134.2:PEH:AM of May 16, 1960; OpJAGN:134.1:RWC:Sb of July 12, 1962.

As already noted, both 5 U.C.S. 59(c) and 10 U.S.C. 6112(b) were repealed in 1962,[44] and as shown in the United States Code, 18 U.S.C. 281 through 18 U.S.C. 284 were repealed on October 23, 1962, ". . . except as 18 U.S.C. 281 and 18 U.S.C. 283 may apply to retired officers of the armed forces", to quote from the repealing statute. (76 Stat. 1126, section 2.)

This short history is presented to the Court as a general background to the complexities faced by the appellants, today, who are charged with carrying a heavy burden of attacking two statutes which, when viewed for the first time, might appear to be relatively simple.

LEGISLATIVE INTENT, 37 U.S.C. 801(c)

Despite what ever "legislative intent" may have underlain the original enactments leading to 5 U.S.C. 59(c) and 10 U.S.C. 6112(b), the appellants accept that the "legislative intent" underlying 37 U.S.C. 801 (c) was aimed at stopping "influence peddling."

STANDING TO SUE

Before the Court of Appeals, the government made no effort to claim the issues were "moot."

The "issue" was raised during the oral hearing before the Circuit Court of Appeals on January 17, 1979,

[44] It is rather remarkable that these two statutes survived for fifteen years after the enactment of the Unification Act of 1947, which, ostensibly "unified" the armed forces under the Department of Defense, and led to the repeal, amendment, or re-enactment of hundreds of statutes originally enacted prior to unification by the Naval Affairs Committee and the Military Affairs Committee pursuant to their jurisdiction over the Navy and Army, respectively since the establishment of the Committee system in the Congress.

by a leading question from one of the Judges. The Judge suggested to the United States Attorney that perhaps the controversies in *Field*, attacking 18 U.S.C. 281 and in *Little*, attacking 37 U.S.C. 801(c) were "moot."

The United States Attorney agreed.[45]

This agreement by the United States Attorney was borne out in the Circuit Court's opinion in Commander Little's case.

It is difficult to assess what happened in Captain Field's case, as the Circuit Court, finding that the Acting Assistant Attorney General on June 27, 1978 had written to JAGN stating that the Department of Justice would not prosecute cases under 18 U.S.C. 281 "due to the vagueness of the statute," returned the case to the District Court with instructions to dismiss the complaint "without prejudice" in order to enable Captain Field to renew his complaints if the Department of Justice reverses its position.[46]

At the commencement of these controversies, neither Judge Richey nor Judge Corcoran entertained the least doubt that the litigants before them had presented a viable case or controversy, and had "standing to sue."

Indeed, it would have been difficult to reach any other conclusion, since the record showed that Captain Field had "confessed" to violating 18 U.S.C. 281; had

[45] Unfortunately, there is no transcript of this oral hearing, as the transcribing machine malfunctioned.

[46] The Department of Justice had been standing before the Courts since December of 1974 maintaining that the statute was not vague, and indeed, in their Brief for Appellees filed on October 4, 1978 were still maintaining that the statute was not vague.

undergone a criminal investigation which confirmed this from his employer and SUPSHIPS; and the record had been transferred to the Department of Justice for further processing . . . and the government was successfully maintaining that it had every right to do this, and Captain Field was not entitled to any injunctive relief to stop them.

Similarly in Commander Little's case, had he not filed his complaint, the Navy *would* have stopped his retired pay at the next pay period, and then proceeded to collect from him, by either continuing the stoppage until the entire $30,000 (plus) was withheld, or taking other steps to recover these "unlawful" payments.

After filing the complaints, in both cases, the government successfully avoided all efforts by Captain Field and Commander Little to stop the government from proceeding, pending the outcome of their litigation.

Hence, it is clear, the government successfully maintained that it was acting properly, and had the power to proceed, and had the legal authorization to proceed.

Then what happened, of course, both Captain Field and Commander Little started "tying the government up in its own legal knots."

It was obvious that an officer like Commander Little, with a wife and four teen-aged children was standing before a Court of law complaining that he was losing over $30,000 for doing absolutely nothing morally or ethically wrong, and without a scintilla of any "due process" protections, the Court's conscience would be shocked.

So, the Navy started "backing away."

This proved difficult in light of Rear Admiral McDowell's adamant refusal to discuss the situation with counsel before the complaint was filed.

To circumvent this kind of embarrassment, Rear Admiral McDowell (JAGN), "transferred" the case back to the Navy Accounting and Finance Center, Washington to whom JAGN had addressed his February 4, 1977 letter stating that Commander Little had violated 37 U.S.C. 801(c). This was the activity which had assured Commander Little's counsel on February 10, 1977 that there were no attorneys attached to the activity.

An affidavit [47] was then submitted with the Answer filed on March 28, 1977, which stated that an opinion of the Navy Comptroller was being requested.

As the record shows, the Navy Comptroller eventually requested another investigation by NIS, and somehow or other, before the situation ended, the General Counsel of the Navy had rendered an opinion.

Captain Field was treated differently. What happened was that the government, unencumbered by any injunctions to stop their proceeding, simply did not proceed, save to continue to bar him from doing his work,[48] as they have done to this day.

This kind of "action" or "inaction" does not render the cases "moot."

After all, the government was the "aggressor." Certainly Captain Field did not want to be prosecuted,

---

[47] This affidavit appears at JA-18 of Case No. 78-1716.

[48] The recent correspondence, still unanswered by JAGN appears in Appendix C, pages 87a-90a.

yet he had no choice if he was to stop it, save to enter the "civil" side of the Court system. Similarly, Commander Little didn't want to lose $30,000 or more, and he too had no choice. Captain Field wanted to work; he is even now, barred.

And certainly, the entire "power" to proceed lies with the government, that started off so deliberately to "enforce the law."

Usually, the Courts do not let cases like this drag on and on as happened in Captain Field's case. Indeed, Judge Corcoran stated at the first hearing on March 29, 1977 that he was going to set Commander Little's case down for an early hearing . . . and then never did.

The law is very clear. As stated by the Supreme Court in *Super Tire Engineering Company* v. *McCorkle,* 416 U.S. 115 (1974):

> "In considering whether a suit for declaratory judgment regarding governmental action is moot, the Court must consider whether short term nature of action makes issues presented capable of repetition, *yet evading review,* so the petitioners are adversely affected by the government without chance of redress." (Emphasis supplied.)

From another angle, the Seventh Circuit held in *Rabinowitz* v. *Board of Junior College District No. 508,* 507 F.2d 1255 (C.C.A. 7) (1974):

> "Voluntary cessation of act complained against in suit for injunction and declaratory relief is not sufficient to moot litigation, but it must appear *with assurance* that there is no reasonable expectation that wrong will be repeated, and *defendants have a heavy burden of persuasion."* (Emphasis supplied.)

What the Circuit Court actually did in *Field* was abandon the fundamental function of the courts . . . to "interpret the law" . . . and vested this in the Attorney General, who, if he decides that the statute is not "vague", as he maintained for so long, can reinstitute the criminal procedure against Captain Field, and then Captain Field can renew his complaint. *Marbury* v. *Madison,* 1 Cr. 137 (1803).

In *Little,* the evidence shows that the government has only stated that "it has insufficient evidence at this time" to stop Commander Little's retired pay.[49]

This was a pure subterfuge to try to avoid a judgment in favor of Commander Little. For this is what the actual "evidence" shows:

At JA-23 of Case No. 78-1716, an NIS Report is reproduced which shows the investigator adopted the "definition of selling" set forth at footnote 3, supra, and went through it clause by clause. He reported that Commander Little had engaged in liaison with customers which led to contracts.[50]

In any event, the evidence is overwhelming that the "government is still very much alive", and *retains its*

---

[49] See Office of Comptroller letter to Commander Little dated April 12, 1978, at JA-27, Case No. 78-1716.

[50] JAGN's opinion of February 4, 1977 was based on Commander Little's statement that he had been conducting liaison with Foreign Military Sales Offices. Foreign Military Sales Offices, apparently unbeknownst to JAGN, do not have a procurement budget. These offices are administrative in nature, functioning at the interface of the Department of Defense, The State Department, Foreign Embassies, Foreign Military Forces, United States Armed Forces, and industry, in a very complex "paper" mill. In a general sense, they are certainly, however, "involved in procurement", but usually not for any United States uniformed service.

power to "reinstitute" its adverse actions against Captain Field (i.e. if the Attorney General "changes his mind about vagueness"), and Commander Little (i.e., if any of the numerous officials who contemplate this kind of evidence, decide that conducting liaison with customers which consummate in sales, is selling . . . as obviously the "definition" of selling states it is).

And, as a matter of pure equity, the government has too dirty a pair of hands to stand before any Court at this late date, and maintain that these controversies are moot. It is simply unconscionable for the United States government to put fine, first class American citizens, who obviously have done nothing whatsoever that is even remotely immoral, unethical, or sounding in moral turpitude, through this kind of "legal wringer", only to back down when it is obvious that these citizens have torn every "defense" proposed to utter shreds.

These controversies are very much alive, and the government cannot possibly carry the heavy burden of proof addressed in *Rabinowitz*, for they can no longer be allowed to refute their own evidence.

THE STATUTES—SUBSTANTIVE
THE RIGHT TO WORK

The principle of the right of any person to choose the manner in which he earns his living in pursuit of the normal occupations of life has been long established as a basic right protected by the due process clause of the Fifth Amendment. (*Truax* v. *Raich*), 239 U.S. 33 (1915), *Terrace* v. *Thompson*, 263 U.S. 197 (1923).

The only recognized exceptions to this rule are those in which the individual, who through his personal misconduct, has forfeited this right pursuant to a conviction of a crime. (*Deveau* v. *Braisted*, 363 U.S. 144 (1960) (a convicted embezzler, barred from further collection of union funds); *Hawker* v. *New York*, 170 U.S. 189 (1898), (a convicted abortionist barred from practicing medicine); *Ex Parte Wall*, 107 U.S. 265 (1882), (a convicted lawyer who had led a lynch mob, barred from practice.)

In other special cases, such as requiring professional qualifications as conditions precedent to working (e.g. *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976), or required retirement (e.g. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), or occupations where health laws must be observed (e.g. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), the right can be curtailed.[51]

18 U.S.C. 281 and 37 U.S.C. 801(c) bar retired regular officers from the *normal occupations* of "selling" to their former services for life (18 U.S.C. 281), and to any of the seven uniformed services, three of which are not even under the Secretary of Defense, for a period of three years.

The appellants are perfectly willing to admit that should these activities be barred by 18 U.S.C. 207, they would not object to the unreasonableness of the constraints. "Switching sides" in matters under one's cognizance in any pursuit, to assist the opposing side in the same matter is obviously a "conflict of interest."

Pro arguendo, what the Congress is apparently trying to do is proscribe activities described as "influence peddling" or the "exercise of sinister or undue influ-

[51] These are the cases the government relied on in their Appeal Brief, to "justify" curtailing "selling" activities.

ence", *in a total vacuum of any legal definitions or precedents setting forth what elements of conduct constitute these activities.*

In so doing, they have shot at gnats with elephant guns, addressing the normal occupation of "selling", which in a market totalling over one hundred billion dollars a year, is a large market.

What happened was, the appellants ran into a National Paranoia, reeking of McCarthyism. The very idea of allowing retired military brass to enjoy the fruits of a "buddy system" and join a sinister military-industrial complex, when articulated in the terms of the "sanctity of the defense procurement environment" is inflammatory.[52]

This kind of paranoia is exacerbated when the government, advocating cases in the name of the Secretary of Defense, injects the term "conflicts of interest" no fewer than fourteen times in its Brief for Appellees, and sprinkles such terms of "influence peddling" and "undue influence" throughout their arguments "justifying" these statutes.

It would seem far more logical that men who have devoted their lives to serving their Nation under a solemn oath to support and defend the Constitution and laws of this Nation, be accorded the basic presumption of total honesty by their government, and not denied a basic and fundamental American right, simply because while serving their Nation, they happened to

[52] At JA 30 of Case No. 78-1716 a press release by Senator William Proxmire, of January 26, 1976 typifies this kind of articulated "fear."

have held a "regular" commission in the armed forces, and have been retired from this honorable service.[53]

The government has consistently relied on cases in which retirees from various occupations were trying to get re-hired, or stop the retirement processes, which are totally irrelevant here. In their Appeal Brief, they "distinguish" *Truax* and *Terrace* because they attacked statutes constraining the employment opportunities of aliens!

The *prima facie* case is obvious. Broad-based constraints are placed on a normal occupation, solely because of an unrelated status "earned" by the appellants in honorable service to the Nation. The government cannot possibly present any viable, non-emotional, "evidence" which could overcome these *prima facie* cases.

ATTAINDER

In similar vein, these statutes are obvious Bills of Attainder.

They address a status gained through the occupation of a "regular" officer in the military service, and deny him, because of that status, the right to engage in the normal civilian occupation of selling "anything" (18 U.S.C. 281), or "supplies or war materials" (37 U.S.C. 801(c).)

One of the defenses presented to the Courts (and addressed by Judge Richey in his August 26, 1976 Orders) was that if the appellants didn't like these

[53] And, of course, the record shows this clearly. The paucity of cases involving these statutes, in light of the millions of "retired man years" now on the records stand for themselves

constraints, all they had to do was give up their status as "retired regular officers."

This is a tremendous price for a citizen to pay to enjoy a normal constitutional right, and obviously shows that it is not the "act of selling" that is prohibited, it is the "status" of the individual who finds himself, because of this status, prohibited from selling.

This is a far "worse" situation than the Court addressed in *Ex parte Garland,* 71 U.S. 333 (1867) and *Cummings* v. *Missouri,* 71 U.S. 277 (1867), where the individuals had been barred, because they served the Confederacy, from practicing their former professions after the termination of the Civil War.

Insofar as Commander Little is concerned, the situation also involves the principles expressed by this Court in *United States* v. *Lovette,* 328 U.S. 303 (1946), where a statute worded remarkably similar to 37 U.S.C. 801(c) was struck down because it provided for the withholding of civil service pay from civil servants suspected of subversion, *without providing for any kind of intervening judicial process.*

The facts here are painfully clear.

Neither Captain Field or Commander Little have ever been convicted of any crime, whatsoever.

Both complain against statutes addressing a perfectly normal American occupation.

The record shows that there was absolutely no causal or proximate connection, whatsoever, between either officer during his active service to his Nation and his eventual employer once the officer had retired.

The record shows that no "military or defense" purpose whatsoever was being addressed by these statutes.

The record shows that it is not the "act of selling" which is proscribed as either *mala in se* or *mala prohibita,* but the "act" coupled with the retention of the unrelated "status" of being a "retired regular officer."

Insofar as 37 U.S.C. 801(c) the record is abundantly clear that absolutely no judicial process intervenes between the citizen and his loss of retired pay.

VAGUENESS

Of course both statutes are vague. This is not because the appellants say so, but because the President's Blue Ribbon Panel on the Department of Defense, 1970, made up of eminent attorneys and businessmen stated the statutes were, and every year since then, the General Counsel of the Department of Defense has echoed this denunciation in recommending that the Congress try to straighten these statutes out.

In addition, JAGN is obviously on record as stating the statute is imprecise, indefinite, inscrutible, negatively-phrased, and ambiguous, as shown in his Reference Guide, *supra,*[54] and the Circuit Court has officially recognized the denunciation by the Department of Justice.

The general principle of law is ancient and hoary. An individual of ordinary intelligence must be able to

---

[54] It is noteworthy that during the entire course of this litigation, with the Secretary of the Navy before the Court as a named "defendant" maintaining the statute was not vague, the Chief Legal Officer of the Secretary of the Navy, JAGN, made no attempt to revise his "Reference Guide."

understand what a statute constraining his activities and providing penalties means, else the statute is unconstitutionally vague.

Of course, all the appellants can do is stand before the Court and say, "we don't understand this." The government must then stand before the Courts and somehow or other, "justify" the *fact* that either the Chief Legal Officers of all the named defendants have stated that they too believe the statute is vague . . . or explain to the Court why these Chief Legal Officers are less intelligent than ordinary persons.

DISCRIMINATION

These statutes are totally discriminatory . . . not because of "discrimination" when the forerunners were enacted, but because of the operation of other events which made them discriminatory.

Here, unfortunately, the government was able to avoid "discovery" by simply averring to the Courts that they did not have a readily available means of providing the appellants with the information they desired.

Historically, there were no "retired officers of the armed forces" prior to the Officer Personnel Act of 1947, who were not "retired regular officers." Non-regular officers injured in line of duty were, prior to that time, allowed to retire under existing civil service statutes, which were far more liberal in benefits. And, until after 1947 no "non-regular officers" had ever served long enough to meet the statutory requirements for length of service in order to retire.

However, in 1939 a phenomenon began in the "Officer Corps" which was hithertofore unkown and unplanned.

As the war clouds gathered in Europe, large numbers of officers were rapidly added to the armed forces. The vast majority of these were "non-regular" officers who had previously served in national Guard or other reserve units, or who had been given short courses ("Ninety Day Wonders") and commissioned directly from civilian life.

The magnitude of this phenomena is evident by the Army Register of 1946 which reflects that on V-J Day, there were only 15,600 "regular officers" in the Army (including the Air Corps), and over 1,500,000 "non-regular officers."

The Congress reacted very slowly to this phenomena, vis-a-vis increasing the size of the "authorized" regular armed forces.

As time went on, through the Post-World War II "cold war", the Korean War, the post Korean "cold war", the Berlin Wall and so forth, the personnel requirements for officers did not dwindle, but the authorized numbers of "regular officers" allowed the armed services grew very slowly.

As a result, around 1956 many active duty officers had completed a sufficient number of years on active duty to qualify for retirement, having served their entire careers as "reserve officers."

By 1962 the situation had evolved that of the 140,000 "career retired officers" . . . that is officers retired either for physical disabilities incurred on duty, or who had served twenty or more years on continuous active duty, had grown to come 140.000 officers . . . only 55,000 had held "regular commissions."

The best statistics the appellants have been able to force from the government are shown at JA-2 of Case No. 78-1716. Here, the Table shows 350,949 retired "career" officers. (The Table does not show the numbers of so-called "week-end warriors" who after leaving the service, earned "retirement points" leading to payment of retired pay on the individual's achieving the age of sixty.)

The government has admitted that only 160,000 of those listed are "retired regular officers." However, the government has maintained to the Courts that they do not separate these statistics as to whether the individual is a "retired regular" or a "retired reserve" officer.

The appellants believe the government has these figures, but is afraid to disclose them, as the appellants have good reason to believe that because so many National Guard and other reserve officers called up early in World War II were of higher ranks than most "new" "regular officers" commissioned from the ranks or from the service academies, that the "average" rank achieved by "retired reserve officers" is somewhat higher than that achieved by "retired regular officers", and that the disclosure of this would "shoot down" the arguments made in addressing "discrimination" in such cases as *Hooper, supra,* and *Puglisi et al* v. *United States,* 564 F.2d 403 (C.Ct. 1977), *certiorari denied,* 98 S.Ct. 1606 (1978), in which the "defense" convinced the Courts that "reserve retired officers" were all "week-end warriors", and if "career retired" served less time and achieved less rank than their "regular" brothers, was a shameful mis-statement of facts that were known to the government, but were presented to the Courts to "win" law cases. (This is

exactly what had happened in 1962 in *Taussig* v. *McNamara, et al,* 219 F. Supp. 757 (D.D.C. 1963), *affirmed without opinion,* No. 18134 (D.C.C.C.A. 1964), *certiorari denied,* 379 U.S. 834 (1964).)

By statute, 10 U.S.C. 277, any discrimination between retired regular officers and retired reserve officers in receipt of pay, benefits, or privileges is strictly prohibited.

Obviously the appellants do not wish to drag their "reserve brothers" down into this kind of mire of confusion and constraint, and fortunately, they are currently not affected by these statutes.[55]

Again, because the United States has all the "power", all the appellants can do is try to present the statistics, and draw the inferences from these . . . and challenge the government to actually justify, by facts and figures, and not simply bland statements that "there are differences between retired regular officers and retired reserve officers."

THE EIGHTH AMENDMENT

Using the statistics shown as JA 2, 78-1716, *supra,* it is obvious that as of the date of the statistics (August 22, 1977), the average retired pay for retired officers ranged from a high of $2,636 a month for officers of the four star rank (0-10) retired for physical disabilities, down to an average of $384 a month for officers of the W-1 rank retired for physical disabilities.

What this means is that an officer of the 0-10 rank who is found to have violated 37 U.S.C. 801(c) for a

---

[55] Reserve retired officers are, of course, affected by such statutes as 18 U.S.C. 207 and 50 U.S.C. 1436 discussed, *supra.*

period of three years could lose approximately $95,000.00.

At bar here, is a case in which Commander Little was going to lose over $30,000.00.

Prima facie this is a severe penalty on a citizen who, although doing nothing reprehensible in a moral, ethical, or moral turpitude sense, to suffer for violating a statute which sets no limits, at all on the amount that can be forfeited, nor provides any judicial intervention, whatsoever prior to adjudging the forfeiture.

On its face, the amount is "excessive" even when compared to the maximum $10,000 fine that can be assessed against Captain Field if convicted of violating 18 U.S.C. 281 after a full and fair trial.

It seems to be quibbling to argue whether this as a "fine" or just what it is. The Congress addresses it as a "penalty forfeiture".

Since the Bill of Rights which contains the Eighth Amendment is obviously intended to protect the individual, and in context, "constrain" the sovereign, insofar as the individual is concerned, it obviously makes very little difference whether this kind of a loss of expected income is called a "fine" a "penalty forfeiture", an "assessment", a "loss of retired pay", or whatever. The fact is, the government is taking away something the individual has every right to expect to receive because he rendered honorable service to his Nation.

CONCLUSION—"STATUS"

The appellants realize they have led this Court through a very complex and confusing maze of Constitutional and statutory law.

One of the fundamental problems is that in prior cases, as the citations show, where retired officers have sought certiorari, the Court has refused to grant the writ.

Indeed, the last time this Court addressed any problems raised by retired officers was in *United States* v. *Tyler,* 107 U.S. 64 (1883). Since then, there have been so many societal and military changes in this Nation, that the "status" of these particular citizens has become so complex that neither the Congress, the Executive Department, the Courts, or the individuals can really rationally cope with the problems.

The situation, today is so manifestly ridiculous as to cry out for clarification. For example, because of *Tyler,* the Court of Appeals found, in *Barrett,* that retired officers were still "officers of the United States." Because of *Barrett* the Congress enacted the amendment which now appears as the words in controversy in *Field.* Yet, the statute, 76 Stat. 1126 which repealed 18 U.S.C. 281 except as it applies to retired officers of the armed forces, also enacted 18 U.S.C. 206 which exempts these retirees from the newly enacted 18 U.S.C. 203 which "supplanted" the old 18 281. Then, in the text of 18 U.S.C. 207 also enacted at that time, the statute addresses activities by "former officers and employees" and "officers whose employment has ceased."

The appellants believe it would be ridiculous for them to seriously contend, and expect to prevail in a Court, that because of this, they could not be prosecuted under 18 U.S.C. 207.

So again, like *Hooper* who found that he could be court-martialed, even though officers and enlisted men

on active duty committing crimes off their bases can not (*O'Callahan* v. *Parker,* 395 U.S. 258 (1968), *Relford* v. *Comandant,* 407 U.S. 355 (1971), this confusion of status frustrates litigants such as *Puglisi* who must litigate from their "status", as Captain Field and Commander Little must do, simply because the statutes address only "retired regular officers."

The government has played so fast and loose with facts, here, that the appellants feel quite confident that the Court will recognize which parties are desperately attempting to keep the salient facts and all the salient facts before the Courts, and which parties are obviously determined to avoid, obfuscate, and mis-state facts.

CONCLUSION—FACTS

The appellants firmly believe that if the Court addresses the actual salient, material, and relevant facts, as opposed to all the mis-statements, half-truths, and obfuscations which developed in these records over the years of litigation, that it will readily perceive exactly what the appellants are concerned about.

They seek absolutely nothing above and beyond the "equal protection of the law", and they are entitled to no less than "equal justice under law."

The appellants are obviously "confused" as to their status, not because they do not totally appreciate the fact that they are "citizens first", but because the Congress, the Courts, and the Executive have made a totally confused "status" amongst those citizens who also happen to have served their Nation faithfully, loyally, and honorably while holding a "regular" commission in the armed forces, into a second class status.

The government admits that they have absolutely no future plans to ever utilize the services of the appellants in the future. The government admits that they not only do not require the appellants to undergo any kinds of physical or mental examinations after retirement, but that they are not even entitled to such examinations, and may receive them only if personnel and space are available, as a lower priority than active duty dependents. The government admits these appellants have no authority, duties, or responsibilities in any military context, and are not required to take any kind of military course, attend any kind of military drill, or involve themselves in any kind of military function, whatsoever. The government even admits that if the appellants choose to have their retired pay checks sent to a bank or other qualified institution, the government does not even know where the appellants live.

On the other hand, the appellants have earned the honors they carry, and have earned the underlying gratitude of their fellow citizens. It is a grim *quid pro quo* to suggest that the pay, privileges, and honors given these citizens by their fellow citizens, must be offset by these restrictions on their private employment, and the obvious harrassments of the "Statements of Employment."

To center upon this class of citizens the paranoia of suggesting they are "influence peddlers", or so prone to "conflicts of interest" that they, and only they, must be constrained above and beyond 18 U.S.C. 207 in their post-retirement civilian activities, is a gross canard, unworthy of the government that has been maintaining this premise before the Courts all these years.

It may well be that this utter confusion is grist for a fascinating legal reasoning mill that tries to justify all the wrongs being done the appellants here, to conjure up some rationale which can justify what the government has been doing and is doing to these fine Americans.

The Congress is wrong. They have exceeded their powers. The Secretary of Defense is wrong. He has exceeded his powers. Various officers, employees, agents, and attorneys of the Secretary of Defense are wrong, for they have subverted their statutory duties, and violated statutory constraints in a mis-guided effort to "win" law suits, as opposed to performing their paramount duty of executing *their* solemn oaths to uphold the Constitution and laws of their Nation.

And most unfortunately, the lower Courts have been wrong in leaning over backwards to support these unlawful, and unwarranted harrassments of the fine citizens who have been seeking nothing more than basic protections of basic rights.

The actual material and relevant facts are clear. The government has furnished every one of them. From these relevant and material facts, the "law" is crystal clear and unimpeachable.

Respectfully submitted,

JOSEPH K. TAUSSIG, JR.
#906, 1625 Eye St. N.W.
Washington, D.C. 20006
Counsel for Petitioners

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1781

HENRY C. FIELD, JR., APPELLANT

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

No. 78-1336

HENRY C. FIELD, JR., APPELLANT

v.

HAROLD BROWN, ET AL.

No. 78-1376

JOSEPH E. HOKER, ET AL., APPELLANTS

v.

HAROLD BROWN

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 78-1716

JAMES G. LITTLE, APPELLANT

v.

W. GRAHAM CLAYTOR, JR., ET AL.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 74-1590, 77-0735 & 77-0349)

Argued January 17, 1979

Decided November 13, 1979

Judgment entered this date

Joseph K. Taussig, Jr. for appellants.

Gordon C. Rhea, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellees.

George D. Webster and *Michael Lenehan* were on the brief, for *amicus curiae* urging reversal.

Also *Richard A. Graham*, Assistant United States Attorney, entered an appearance, for appellee.

Before MCGOWAN and MACKINNON, *Circuit Judges*, and OBERDORFER *, *United States District Judge*, United States District Court for the District of Columbia.

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *District Judge* OBERDORFER.

OBERDORFER, *District Judge*: These consolidated appeals involve challenges by retired officers of the Navy to the constitutionality of two statutes that restrict their ability to make sales to the armed services. 18 U.S.C. § 281 (1976) forbids retired regular military personnel from "represent[ing] any person in the sale of anything to the Government through the department in whose service he holds a retired status" and provides a possible fine of $10,000 and a two-year term of imprisonment.[1] 37 U.S.C. § 801(c) (1976) prohibits the distribution of retirement pay to retired regular officers who en-

---

[1] 18 U.S.C. § 281 (1976) states, in part:

> [Any officer who] directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.
>
> Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

In 1962 this statute was partially repealed, remaining in force *only* for "retired officers of the Armed Forces of the U.S." As a result, "retired officers" can deal with the Government in a private capacity except that they may not "represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 2213, 87th Cong., 1st Sess. 12 (1962).

gage in "selling, or contracting or negotiating to sell, supplies of war material" to the armed services and certain other governmental agencies within 3 years after the date of their retirement.[2]

Appellants also challenge the procedures adopted by the Department of Defense and by the Navy for monitoring compliance with 37 U.S.C. § 801(c). Specifically, they claim that Department of Defense (DOD) Directive 5500.7, which requires retired regular officers to submit a describption of their employment to the Department,[3] and DD Form 1357, which is the "Statement of Employ-

[2] 37 U.S.C. § 801(c) (1976) states:

> Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

[3] DOD Directive 5500.7, entitled "Standards of Conduct," promulgates ethical standards for Department of Defense personnel "relating to possible conflict between private interests and official duties." The portion of the Directive challenged by appellants appears under the heading, "Retired Regular Officers," and states in part:

> a. Each regular retired officer of the armed forces shall file with the military department in which he holds a retired status a Statement of Employment (DD Form 1357). Each regular officer retiring hereafter shall file this Statement within thirty days after retirement. Whenever the information in the statement is no longer accurate, each such officer shall file a new DD Form 1357.
>
> b. The military departments shall appropriately review the Statements of Employment to assume compliance with applicable statutes and regulations.

ment" required by Directive 5500.7,[4] violate the constitutional privilege against self-incrimination and the Privacy Act, 5 U.S.C. 552a (1976).

The District Courts hearing these cases below upheld the statutes and procedures in the face of appellants' wide ranging attacks. We affirm.

I.

A. *Field v. Brown*

Appellant Field, who retired from the Navy in August, 1968, began working in December 1973 for Metro Machine Corporation, a company based in Norfolk, Virginia that is primarily engaged in repairing Navy ships. Field served as the "point of contact for contractual matters and inquiries by the Navy." In that capacity he received Navy job orders, responded to Navy inquiries regarding the performance of contracts, prepared price quotations and presented them to the negotiating agent for the Navy, and signed formal Navy bids, proposals, and job orders.

[4] DD Form 1357 was modified during the course of this litigation. The "old" form required a retiree to submit his employer's name and address, to indicate what goods and services, if any, his employer provided to the Defense Department or specified agencies, to describe his own position and duties, and to subscribe to the statement: "My duties do not involve selling to the Government in violation of the statutes and policies cited in the regulation received" [referring to 18 U.S.C. § 281].

A "new" DD Form 1357 supplanted the old form as of January 1, 1977, and it is still in use. The new form added a Privacy Act disclosure and expressly provided that failure to file the form would not in itself trigger criminal sanctions.

On September 11, 1974, at his employer's request, Field wrote to the Judge Advocate General of the Navy (JAGN) for advice concerning his compliance with 18 U.S.C. § 281, the statute that proscribes retired regular officers from representing persons in the sale of materials to the government under certain circumstances. The Judge Advocate General's Office responded on October 1 that Field's case was being turned over to other authorities "for investigation with a view to resolving the possible penal and civil liabilities, if any, which you may have incurred as a result of your employment." The letter also advised appellant Field that further communication with the JAGN office "presumably would not be in your best interests at this time."

On October 29, 1974, the Navy directly contacted Metro Machine by letter, advising it that Navy personnel would not be permitted to discuss sales matters with Field. Field's employer thereafter excused him from job assignments involving the Navy.

Two days later, on October 31, 1974, Field filed a complaint alleging that § 281 was fatally vague, constituted a bill of attainer, had been effectively repealed by other recent legislation, and unconstitutionally restricted his purported property right to earn a livelihood. He also maintained that Directive 5500.7 and DD Form 1357 violated his privilege against self-incrimination under the Fifth Amendment and Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, by confronting him with the choice of filing the form and risking the use of its contents against him in a prosecution under 18 U.S.C. § 281, or not filing it and risking a court-martial under 10 U.S.C. § 892 for failing to comply with a military regulation. Field later moved to amend his complaint to include claims that § 281 is unconstitutionally discriminatory because it proscribes the activities of retired regular officers, but not those of retired reservists, and that DD Form 1357 violated the Privacy Act.

In an order dated April 7, 1976, the District Court granted appellees' motion to dismiss Field's allegations that 18 U.S.C. § 281 constituted an unconstitutional deprivation of the alleged right to freely choose and earn one's living. The Court at the same time rejected Field's argument that the statute unconstitutionally discriminates between regular and reserve officers and that the statute is impermissibly vague.[5] Later, however, the Court ruled in favor of appellant by finding that DD Form 1357 asked for information that would force Field to incriminate himself under 18 U.S.C. § 281. The Court accordingly enjoined the Navy from demanding Field's compliance with the form to the extent that it "requires [Field] to submit information concerning his private employment which may tend to incriminate him . . . ." *See* Order of August 26, 1976.

Shortly thereafter, on September 9, 1976, Field requested the District Court to amend its August 26 Order to hold that DD Form 1357 violated the Privacy Act. The Government never responded to Field's motion and on November 12 the Court treated it as conceded.[6]

---

[5] The District Court refused to permit appellant Field to amend his complaint to add discrimination and vagueness counts relating to 18 U.S.C. § 281. It did so on the authority of *Taussig v. McNamara*, 219 F. Supp. 757 (D.D.C. 1963), *aff'd without opinion*, No. 18134 (D.C. Cir. April 6, 1964), *cert. denied*, 379 U.S. 834 (1964).

[6] The District Court held an evidentiary hearing on June 2, 1977 to determine whether the Government should be required to pay costs for the Privacy Act violation that the Court had treated as conceded. On June 17, 1977, the Court ruled that Field had failed to show that appellees were "in willful or intentional disregard of the rights of [Field] (or anyone else) under the Privacy Act." The Court denied the application for damages and attorneys fees while observing that "the evidence of record clearly demonstrates that defendants and their agents made good faith attempts to comply with both the letter and the spirit of the Privacy Act at all times from its effective date to the present."

On January 1, 1977, the Defense Department published a new DD Form 1357 providing for Privacy Act disclosure and an explanation of possible consequences of a failure to complete the form.[7] On September 28, 1977,

---

[7] *See generally* note 4 *supra*. The "new" DD Form 1357 includes a section entitled: "Data Required by the Privacy Act." That section states, in pertinent part:

PRINCIPAL PURPOSES:	Information is required from retired regular officers to enable Department of Defense personnel to determine whether such officers are engaged in activities prohibited by law or regulation, including those that could result in the loss of retired pay or a reduction in retired pay due to other Federal employment.
ROUTINE USES:	The information supplied on this form is forwarded to the Military Department in which the individual holds a retired status and is appropriately reviewed to assure compliance with applicable statutes and regulations.
DISCLOSURE:	Disclosure of the requested information is voluntary in the sense that no criminal penalties will follow from failure to file. However, the information requested by this form is required to enable the Department of Defense to implement 37 U.S.C. 801(c) and 5 U.S.C. 5532. If the information is not provided, further investigation will ensue which may lead to the withholding of retired pay and the referral of the matter to the Comptroller General of the United States or other Federal agencies.

Field moved the Court to require appellees to show cause why they should not be held in contempt. He contended that DOD Directive 5500.7 and the new DD Form 1357 continued to violate the Court's orders of August 26 and November 12, 1976. The District Court denied the motion explaining that it "fail[ed] to state any ground for the contempt order [Field] seeks." Field has appealed from this ruling, and from the District Court's April 7, 1976 Memorandum and Order, which dismissed his claims that § 281 unconstitutionally interfered with his purported right to earn a livelihood and discriminated between regulars and reserves.

B. *Hoker v. Brown*

Appellant Hoker is a retired regular naval officer who filed a complaint on April 29, 1977 challenging DOD Directive 5500.7 and DD Form 1357 on self-incrimination and Privacy Act grounds. Ruling on cross-motions for summary judgment, the District Court held on January 18, 1978 that the disclosure on the "new" DD Form 1357[8] "remov[ed] the compulsory aspect of the old form found self-incriminatory in *Field*" and complied with the Privacy Act by soliciting only information "relevant to the subject matter of" 37 U.S.C. § 801(c) and 5 U.S.C. § 5532, and "necessary to the accomplishment of their purposes."

C. *Little v. Claytor*

Appellant Little retired from the regular Navy in October 1973. Shortly thereafter, in December, 1973, he secured employment with Sperry Flight Systems, a company that sells aircraft equipment to private corporations and the military. He submitted a DD Form 1357 on October 1, 1975, followed by a more detailed version

---

[8] *See* footnotes 4 and 7.

on October 22, in which he described himself as Sperry's Mid-Atlantic representative.

The Judge Advocate General's Office informed Little in a letter dated January 15, 1976 that it required more information to determine whether he was violating 18 U.S.C. § 281 or 37 U.S.C. § 801(c). The letter warned that although disclosure was voluntary, failure to comply with the request might lead to an investigation, and that in any event JAGN might submit the disclosures to other agencies for possible use in administrative, criminal, or civil proceedings.

Little answered by resubmitting a copy of the October 22 form. The JAGN in turn requested additional information, but Little did not respond.

Little resigned from Sperry Flight Systems on March 20, 1976. Later that year, the Navy Investigation Service completed a study of Little's employment with Sperry and the Service concluded that Little had occupied a "sales position" and that his March resignation was prompted by his unsatisfactory job performance. On February 4, 1977, JAGN wrote to the Commander of the Navy Accounting and Finance Center expressing its opinion that Little "violated 37 U.S.C. § 801(c) throughout the period of his employment as a sales representative for Sperry Flight Systems," basing its conclusion in part on information from his DD Form 1357.

Little filed a complaint for declaratory and injunctive relief on March 2, 1977. He challenged 37 U.S.C. § 801(c) as unreasonably restricting his opportunities for earning a living, imposing an excessive forfeiture in violation of the Eighth Amendment, unlawfully discriminating between retired regular officers and retired reservists, constituting a bill of attainder and containing unconstitutionally vague language. He also alleged that the Defense Department's requirement that he submit a DD

Form 1357 violated his Fifth Amendment privilege against self-incrimination and his rights under the Privacy Act.

Shortly after the filing of this complaint, the United States Attorney for the District of Columbia informed appellant's counsel that the Judge Advocate General of the Navy had reviewed appellant's DD Forms 1357 and determined that the information available did not justify the conclusion that appellant had violated 37 U.S.C. § 801(c), despite earlier indications to the contrary. This representation was followed a year later by an opinion by the Navy Comptroller that "there is insufficient evidence to support a finding that CDR Little was employed in violation of 37 U.S.C. § 801(c)."

The District Court dismissed Little's constitutional challenge to 37 U.S.C. § 801(c) on May 15, 1978, on the ground that his "alleged present injury [is] remote and speculative." The Court dismissed the self-incrimination and Privacy Act claims against the "new" DD Form 1357 under the authority of the ruling in the *Hoker* case.[9] As to whether the "old" DD Form 1357 violated the Privacy Act, the Court ruled that appellees "did not violate the Privacy Act in soliciting information under the old form and that the damage claim accordingly must fail."[10] The District Court did find, however, that the "old" form violated the privilege against self-incrimination and it enjoined appellees from using information from that form against appellant in civil or criminal proceedings. This appeal followed the District Court's denial of Little's motion for reconsideration.

---

[9] *See* text accompanying note 8, *supra*.

[10] In reaching this decision, the District Court noted that the *Field* Court's ruling in favor of appellant on the Privacy Act claim was not a decision on the merits. The Court in that case treated Field's Privacy Act claim as conceded because of the Government's failure to respond to the motion. *See* note 7, *supra*, and accompanying text.

II.

A. *Privacy Act*

Appellants Hoker and Little [11] reassert their claims that the "old" and "new" DD Forms 1357, issued pursuant to Department of Defense Directive 5500.7, violate the Privacy Act, 5 U.S.C. 552a (1976). We are persuaded, however, that the Government's use of DD Form 1357 does not violate the provisions of the Privacy Act, and accordingly we affirm the District Court's dismissal of those claims.

The Privacy Act requires that each agency maintaining a system of records shall "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1) (1976). The Act directs agencies to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs." 5 U.S.C. § 552a (e)(2) (1976). It also requires that when an agency solicits information from an individual, the agency must inform the individual of the authority for requesting the information, the purpose for which the information is intended to be used, the routine uses that might be made of the information, and the effect of not providing all

[11] Appellant Little prevailed on his Privacy Act violation in the District Court when the Government failed to respond to his motion and the Court treated it as conceded. *See* note 7, *supra*, and accompanying text. The Court later refused, however, to enter a contempt order based on that judgment, and it also denied appellant Little's motion for costs.

or any part of the requested information. 5 U.S.C. § 552 a(e)(3) (1976).[12]

The Department of the Navy's use of DD Forms 1357 satisfies the substantive requirements of the Privacy Act. When the Department used the old DD Form 1357,[13] the policy and practice of the defendant was to furnish a "Privacy Act Statement" [14] with each copy that was

[12] 5 U.S.C. § 552a(e)(3) requires that each agency that maintains a system of records shall:

> (3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—
>
> * * *
>
> (D) the effects on him, if any, of not providing all or any part of the requested information.

[13] The "old" form was used until January 1, 1977. *See* notes 4 and 8, *supra*.

[14] The Privacy Act Statement read as follows:

DD FORM 1357 (STATEMENT OF EMPLOYMENT)—PRIVACY ACT STATEMENT

1. AUTHORITY: 44 U.S.C. Article 3301; § U.S.C. Article 801; DOD Dir 5500.7, SECNAVIST 5370.2F (sorter)

2. PRINCIPAL PURPOSE(S): Information is requested to be submitted by retired Regular Navy and Marine Corps officers to enable Department of the Navy officials to monitor compliance with laws providing civil or criminal sanctions for engaging in certain proscribed post-retirement employment actvities.

3. ROUTINE USES: Information provided in the form may be furnished to other naval and DoD components; the U.S. General Accounting Office; the Civil Service Commission; the Department of Justice; the Department of Treasury; and other Federal agencies as appropriate for review, investigation, administrative action, criminal prosecution, or civil litigation; and to Congress.

4. DISCLOSURE MANDATORY/VOLUNTARY, CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is

distributed.[15] This statement described the authority for requesting the information; the principal purpose for which the information was to be used ("to monitor compliance with laws providing civil or criminal sanctions for engaging in certain prescribed post-retirement employment activities"); the routine uses that might be made of the information; and the consequences of nondisclosure ("[r]efusal to provide the information will result in inquiry into the individual's entitlement to receive retirement pay and notification to the Department of Justice for other appropriate action.") Thus, the Privacy Act Statement that accompanied the old DD Form 1357 contained all the elements required by 5 U.S.C. § 552a(e)(3). The new DD Form 1357[16] incorporated a modified version of the disclosures made in the former "Privacy Act Statement," making them part of the form itself. Thus, it too contained the elements required by § 552a(e)(3).

In addition to containing the required disclosure, both the old and new DD Forms 1357 satisfy § 552a(e)(1) by requiring only the minimum amount of information needed to evaluate compliance with 37 U.S.C. § 801(c) and 5 U.S.C. § 5532. Both forms are simple and direct; they ask retired regular officers whether and in what capacity their employer deals with the Defense Department and other government agencies and, if their em-

---

mandatory. Refusal to provide the information will result in inquiry into the individual's entitlement to receive retirement pay and notification to the Department of Justice for other appropriate action.

4ND NAVFINCen 1800/24 (11-75)

CA 77-0735

[15] Distribution of the "Privacy Act Statement" began with the passage of the Act.

[16] *See* note 8, *supra*.

ployer does sell materials to the government, DD Form 1357 requests the retired regular officer to describe the duties he or she undertakes for the employer. Neither version of the DD Form 1357 solicits extraneous information; neither contains wide-ranging, open-ended inquiries. The forms thus satisfy the letter and spirit of § 552a(e)(1) of the Privacy Act.

The Department of Defense's use of the DD Forms 1357 also comports with § 552a(e)(2)'s admonition that agencies shall collect information directly from individuals themselves to the greatest extent possible. By sending the DD Forms 1357 to the retired regular officers, the Department of Defense avoids solicitation of job information from the employers of retired officers or other third parties. The Department thus has adopted the preferred practice of direct contact, minimizing covert investigation and information gathering.

In sum, both the old[17] the new DD Form 1357 satisfy the requisites of the Privacy Act. The Court therefore denies appellants' requests for relief, including damages and attorney's fees,[18] insofar as they are grounded on purported violations of the Privacy Act.

B. *Self-incrimination*

The lower Court in the *Field* case held that the "old" DD Form 1357 violated the Fifth Amendment's privilege

---

[17] The use of information garnered from the "old" DD Form 1357 has been enjoined because the form violates the privilege against self-incrimination. Thus, as a practical matter the appellees cannot take advantage of any Privacy Act abuses contained in the "old" DD Form 1357, should there have been any. The Court nonetheless independently has tested the old form's compliance with the Privacy Act in order to evaluate appellant's request for damages and attorneys' fees because of purported violations of the Act.

[18] *See* 5 U.S.C. § 552a(g)(4).

against self-incrimination [19] because compliance with the form was "mandatory." [20] The Department of Defense subsequently revised the form ("new" DD Form 1357), effective January 1, 1977, in order to cure the self-incrimination defects of the old form.[21] Appellants Field, Hoker and Little all challenged the new form on Fifth Amendment grounds,[22] and the District Courts hearing their contentions all expressly or impliedly [23] found that the new Form 1357 passes muster under the Fifth Amendment. They ruled that the disclosure section of the Privacy Act statement contained on the face of the new DD Form 1357 removes the compulsory aspect of the old form that the *Field* Court had found self-incriminatory. That section states, in part:

> Disclosure of the requested information is voluntary in the sense that no criminal penalties will follow from failure to file . . . . If the information is not provided, further investigation will ensue which may lead to the withholding of retired pay and the referral of the matter to the Comptroller General of the United States or other Federal agencies.

[19] The District Court in *Field* ruled that the "old" DD Form 1357 violated the privilege against self-incrimination, but it refused to find the defendant in contempt for its use of the "new" DD Form 1357.

[20] The "old" DD Form 1357 has been discontinued, and appellees have been enjoined from using information garnered from it against appellants. Accordingly, complaints about the "old" form no longer have the "vitality and immediacy essential to jurisdiction," *Reiss v. Richardson*, 147 U.S. App. D.C. 219, 221, 455 F.2d 1287, 1289 (1971).

[21] *See* note 16, *supra*. The "old" form confronted retired officers with the dilemma of submitting the form and facing the possible use of its contents against them in prosecutions under 18 U.S.C. § 281, or of not filing it and risking court martial under 10 U.S.C. § 892.

[22] The Fifth Amendment to the United States Constitution states, in part, that no person "shall be compelled in any criminal case to be a witness against himself."

[23] *See* "new" DD Form 1357, notes 4 and 7, *supra*.

We affirm. The solicitation of information from retired regular officers through the use of new DD Form 1357 satisfies Fifth Amendment concerns of self-incrimination. Retired officers are not compelled to complete the DD Form 1357. The new form expressly declares on its face that "no criminal penalties will follow from failure to file this form." Although an investigation for possible violations of the conflict of interest statutes will normally result when the form is not filed, the Defense Department clearly has authority to undertake such an investigation in any event, whether the form has been submitted or not. Such an investigation may or may not develop evidence of criminal conduct. But if it does develop such information, it will do so independently of any admission compelled of the defendant. Nor is there any reason to believe that, if an investigation led to a prosecution, the prosecutor would attempt (or be permitted by a Court) to use in evidence the defendant's earlier refusal to complete DD Form 1357. DD Form 1357 thus merely gives retirees the option of voluntarily providing the information rather than forcing the Department to initiate routine investigations in all cases.

In summary, a failure to file the new Form 1357 does not automatically bring reprisal for the assertion of the privilege not to file. *Compare Garrity v. New Jersey*, 385 U.S. 493 (1967). At most, a retired officer will call attention to himself, and an investigation for possible wrongdoing may result, an investigation that the DOD could undertake in any event. The implied threat that failure to complete and file DD Form 1357 could lead to an investigation does not, by itself, violate a constitutional privilege against self-incrimination.

The appellees' use of the new DD Form 1357 also satisfies the Fifth Amendment because the retirees' reporting obligation is imposed upon all retired officers, a distinguished and honorable class manifestly not a "highly selective group inherently suspect of criminal activities." *California v. Byers*, 402 U.S. 424, 430 (1971). Retired regular officers as a class are not inherently suspect and, like taxpayers filing their returns, most of them do not run the risk of incriminating themselves by submitting a DD Form 1357. *Compare Leary v. United States*, 395 U.S. 6 (1969) (registration requirement for marijuana tax struck down); *Marchetti v. United States*, 390 U.S. 30 (1968) (registration requirement for gamblers tax struck down); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) (registration requirement for Communist organization members struck down).

Thus, the new DD Form 1357 does not interfere with the privilege against self-incrimination. Retired officers have a bona-fide, voluntary choice whether to complete the form or not. The form is not directed at a small group of likely violators of the conflict of interest statutes, but it is instead applied even-handedly to all retired regular officers. Appellants' challenges to the new form accordingly must fail.[24]

C. *37 U.S.C. § 801(c)*

Appellant Little attacks 37 U.S.C. § 801(c)[25] on grounds that it unreasonably restricts his opportunities

[24] DD Form 1357 also serves a regulatory function quite apart from enforcement of conflict of interest statutes. The form provides information that enables authorities to reduce pension payments to retirees who are holding federal employment, in accordance with the Dual Compensation Act, 5 U.S.C. § 5532 (1976).

[25] *See* note 2, *supra*.

for earning a living, imposes an excessive forfeiture in violation of the Eighth Amendment, unlawfully discriminates between retired regular officers and retired reservists, constitutes a bill of attainder, and is unconstitutionally vague. The District Court found these constitutional challenges nonjustifiable in light of the Department of the Navy's representation that it had investigated Little's activities fully and found no violation of § 801(c). We affirm.

The Supreme Court often has repeated the principle that plaintiffs are not entitled to invoke the judicial power to determine the constitutionality of a statute unless they can demonstrate that they have sustained, or are in immediate danger of sustaining, a direct injury as the result of enforcement of the statute. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 13 (1972), *Ex parte Levitt*, 302 U.S. 633, 634 (1937). Stated differently, a plaintiff must present "a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. at 14.

Underlying this principle is "a conception of the role of the judiciary in government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 72 (1961). Accordingly, courts should never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.*

In applying these principles to the case before us, we find that appellant Little has failed to demonstrate that the enforcement of § 801(c) has caused or threatened direct injury to him or placed him in any immediate danger of sustaining such injury. The Judge Advocate General of the Navy reviewed his DD Forms 1357 and

determined that the information available did not justify a conclusion that appellant had violated 37 U.S.C. § 801 (c) during his employment with Sperry Flight Systems.[26] After further investigation, the Comptroller of the Navy also concluded that there is insufficient evidence to support a finding that Little's employment with Sperry violated § 801(c). In light of these representations, appellant Little cannot claim that he is a target of the enforcement of § 801(c). At most, there remains a remote possibility of future liability under the statute.[27] "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Communist Party v. Subversive Activities Control Board*, 367 U.S. at 71. Little's constitutional complaints accordingly are not appropriate for judicial consideration.[28]

In summary, we agree with the District Court's assessment that appellant Little's alleged present injury

---

[26] The JAGN initially suggested that Little might be in violation of § 801(c), but it reversed its position. Appellant has failed to demonstrate that the JAGN's initial position caused him any injury.

[27] Section 801(c) only limits retirees' employment options for three years after retirement. Since Little retired from the Navy on October 1, 1973, he cannot contend that § 801 (c) will be enforced prospectively against him. The statute conceivably could be enforced against Little for his previous employment with Sperry, but the Navy has announced that it will not take any such enforcement action.

[28] In his challenge to the constitutionality of § 801(c), appellant alludes to the present and future injury that the statute purportedly causes to all retired regular officers. Absent a showing of appellant's "personal stake in the outcome of the controversy," however, he may not rely on alleged injury to his fellow officers to bootstrap his own constitutional attacks. *Laird v. Tatum*, *supra*, 408 U.S. at 13-14, n.7.

is ephemeral in nature and his prospect of future harm remote and speculative. We accordingly dismiss appellant's constitutional challenge to 37 U.S.C. § 801(c).

D. *18 U.S.C. § 281*

Appellant Field mounts an attack on 18 U.S.C. § 281 that in many respects mirrors Little's challenges to 37 U.S.C. § 801(c).[29] For reasons similar to those which disposed of Little's § 801(c) case, we must dismiss appellant Field's complaints about § 281.

As indicated, plaintiffs who seek to challenge a statute must demonstrate that the statute's application has injured them, or that they are in immediate danger of injury from the statute's enforcement. Without such a demonstration, courts cannot be certain that plaintiffs have the "personal stake" in a controversy that is the prerequisite of judicial intervention.

In the *Field* case, the Department of Justice has represented in a letter dated June 27, 1978 and signed by Acting Assistant Attorney General John C. Keeney, that it will not prosecute cases under 18 U.S.C. § 281 "due to the vagueness of the statute." Given this representation, appellant Field cannot demonstrate that he has been injured or is immediately threatened with injury, due to the enforcement of § 281. Like Little's generalized complaints about § 801(c), Field's challenges do not take on the immediacy required for judicial consideration. Field cannot complain about the enforcement of § 281 when the Justice Department has explicitly represented that it will not enforce the statute because of its vagueness.

---

[29] Little alleges that § 281 is fatally vague, constitutes a bill of attainder, has been effectively repealed, and unconstitutionally restricts him from earning a livelihood.

Of course, if the Justice Department reverses its position regarding the enforcement of § 281, Field then may be able to demonstrate the "personal stake" and immediate danger of injury that now are lacking. In order to enable Field to renew his complaints against the statute should the occasion arise, the District Court should vacate its judgment regarding the viability of § 281 and dismiss the Field complaint without prejudice. *See United States v. Munsingwear*, 340 U.S. 36 (1950).

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-1716

JAMES G. LITTLE, *Appellant*

v.

W. GRAHAM CLAYTOR, JR., et al.

And Consolidated Case Nos. 76-1781, 78-1376 and 78-1336

Before: McGowan and MacKinnon, Circuit Judges; and Oberdorfer *, Judge, United States District Court for the District of Columbia.

ORDER

Filed January 2, 1980

Upon consideration of appellant's (Little) petition for rehearing, and of the attachments thereto, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

---

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

MEMORANDUM OPINION AND ORDER

Filed April 7, 1976

This case is before the Court on several motions: plaintiff's motion to amend the complaint to allege that 18 U.S.C. § 281 unconstitutionally discriminates between Regular and Reserve officers in the armed forces; defendants' motion to dismiss, plaintiff's motion for summary judgment; plaintiff's motion to compel the Secretary of the Navy to personally answer certain interrogatories, and defendants' motion for a protective order in this regard; and plaintiff's motion to amend the complaint to allege that the defendants' conduct violates the Privacy Act of 1974, 5 U.S.C. § 552(a).

This Court must deny plaintiff's motion to amend the complaint to allege that 18 U.S.C. § 281 unconstitutionally discriminates between Regular and Reserve officers, as this issue was resolved against plaintiffs assertion in *Taussig* v. *McNamara*, 219 F. Supp. 757 (D.D.C. 1963), *aff'd per curiam without opinion*, D.C. Cir., April 6, 1964, *cert. denied*, 379 U.S. 834 (1964) (and see subsequent opinion on the merits in that case, C.A. No. 167-73, by Judge Youngdahl). Further, *Taussig* also resolved plaintiff's assertions that 18 U.S.C. § 281 is a non-statute and is unconstitutionally vague and discriminatory. Recent decisions do not change this finding, see *Civil Service Comm.* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973), nor do the facts of this case compel a different result.[1]

Plaintiff's assertion that 18 U.S.C. § 281 is a bill of attainder also lacks merit. The statute clearly was not enacted to legislatively punish a group of individuals for past activities without a judicial determination of guilt. See *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960). Moreover, plaintiff's assertions do not otherwise set forth the essentials of a claim of a bill of attainder. See *Unitd States* v. *O'Brien*, 391 U.S. 367, 383 n.30 (1968).

This Court further rejects plaintiff's assertion that 18 U.S.C. § 281 is an unconstitutional limitation on the alleged right to freely choose and earn one's living. Assuming such a right exists, § 281 has been found to be a legitimate and rational regulation. 219 F. Supp. at 761-62; see also *Morgenthau* v. *Barrett*, 108 F. 2d 481 (D.C. Cir. 1939). This Court further finds, taking plaintiff's argument as an expression of a violation of substantive due process, that § 281's prohibition is reasonably and rationally related to the evil sought to be proscribed: influence peddling. See *Lochner* v. *New York*, 198 U.S. 45, 58 (1905).

Therefore, with respect to the above claims of the plaintiff, defendants' motion to dismiss shall be granted, and plaintiff's motion for summary judgment shall be denied.

One claim remains: that DoD Directive 5500.7 and Form 1357 violate the fifth amendment of the United States Constitution and the Uniform Code of Military Justice. With respect to this remaining claim, plaintiff's complaint does state a claim upon which relief can be granted; the claim, however, is not in a posture so that summary judgment can be granted against or for either party. Defendants admit that this is a penal statute and that the matter has been submited to the Department of Justice. They claim, however, that the filing of the forms is not compulsory and

---

[1] See, Order dissolving the three-judge district court in this action, filed March 5, 1975.

that plaintiff has not filed the forms, and that, in any event, the investigation is not based on information obtained from official forms. Whether these and other assertions are factually supported is not ascertainable from the record. It is clear, however, that these and other facts relating to this claim are in dispute. It is also apparent that the parties have not focused their legal arguments on this point to the degree necessary for a judicial resolution. The Court will therefore give the parties forty-five (45) days to engage in discovery limited to the remaining claim, and further subject to the limitations of the next paragraph, and fifteen (15) days thereafter to file appropriate pleadings.

With respect to discovery, plaintiff has sought to compel the Secretary of the Navy, J. William Middendorf, to personally answer certain interrogatories. Defendants have opposed this and sought a protective order. An examination of plaintiff's discovery request reveals that defendants' motion is well taken. In addition to the fact that the discovery seeks answers to legal questions as opposed to facts, all of the questions are no longer necessary due to the rulings of the Court contained herein. Any questions that remain pertinent can be answered by the responsible officials in the Department of the Navy.

Finally, plaintiff has moved to amend the complaint to allege that the defendants' conduct violates the Privacy Act of 1974, 5 U.S.C. 552(a). Defendants have not filed an opposition to this motion and it will, therefore, be granted, and defendants shall answer within the time provided by the Federal Rules of Civil Procedure.[2]

In accordance with the foregoing, it is, by the Court, pursuant to Rule 1-9(f) of the Local Rules, this 6th day of April, 1976.

---

[2] The Court would hope that the defendants would proceed with this additional claim in conjunction with plaintiff's [remaining] claim that the defendants' conduct violates the fifth amendment of the Constitution and the Uniform Code of Military Justice.

ORDERED, that plaintiff's motion to amend the complaint to allege that 18 U.S.C. § 281 unconstitutionally discriminates between Regular and Reserve officers of the armed forces be, and the same hereby is, denied; and it is

FURTHER ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted except as to plaintiff's claim that DoD Directive 5500.7 and Form 1357 violate the Constitution and the Uniform Code of Military Justice; and it is

FURTHER ORDERED, that the plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the plaintiff's motion to compel discovery be, and the same hereby is, denied; and it is

FURTHER ORDERED, that defendants' motion for a protective order be, and the same hereby is, granted and defendants shall respond to plaintiff's discovery through the appropriate and responsible offices of the Department of the Navy; and it is

FURTHER ORDERED, that the parties shall have forty-five (45) days from the date of this Order to finish all discovery relating to plaintiff's remaining claim that the defendants' conduct violates the fifth amendment of the Constitution and the Uniform Code of Military Justice, and fifteen (15) days thereafter to file appropriate pleadings, and five (5) days thereafter to file responses thereto; and it is

FURTHER ORDERED, that plaintiff's motion to amend the complaint to allege a violation of the Privacy Act of 1974, 5 U.S.C. § 552(a), be, and the same hereby is, granted.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

ORDER

Filed May 20, 1976

Upon consideration of plaintiff's motion for a new trial with respect to the Court's Memorandum and Order of April 7, 1976, defendants' opposition thereto, and the entire record herein, it is by the Court this 19th day of May, 1976,

ORDERED that plaintiff's motion be and it hereby is denied.

/s/ CHARLES R. RICHEY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

Filed August 26, 1976

This case is before the Court on plaintiff's motion and defendants' cross-motion for summary judgment. The plaintiff, a retired naval officer, asks the Court to enjoin the defendants from requiring him, pursuant to Department of Defense [DoD] Directive 5500.7, to complete DD Form 1357, which solicits information concerning the present employment activities of regular retired officers. As grounds for such requested relief, the plaintiff asserts that the DoD Directive violates (1) his fifth amendment privilege against self-incrimination, (2) his privilege against self-incrimination guaranteed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, and (3) the Privacy Act of 1974, 5 U.S.C. § 552(a).[1]

The Court finds that no material facts are in dispute and, for the reasons articulated herein, concludes that the plaintiff is entitled to summary judgment in his favor on his fifth amendment claim. Because of the determination in plaintiff's favor on this claim, the Court finds it unnecessary to address plaintiff's other contentions.

---

[1] Originally, the plaintiff asserted several other claims as well. These, however, were dismissed by the Court in its opinion of April 7, 1976, upon defendants' motion that these other claims failed to state a claim upon which relief could be granted.

As a threshold matter, there can be no doubt that DD Form 1357 specifically asks the plaintiff to incriminate himself. Section 281 of Title 18 of the United States Code prohibits, under threat of fine up to $10,000, imprisonment for as much as 2 years, or both, "any retired officer to represent any person in the sale of anything to the Government through the Department in whose service he holds a retired status." DD Form 1357 requires the plaintiff to describe completely his employment activities and to attest that "[his] duties do not involve selling to the Government in violation of the statutes and policies cited in [DoD Directive 5500.7]." It is hard for this Court to imagine a more direct way of asking the plaintiff to supply information that would have the "direct and unmistakable consequence of incriminating" him under 18 U.S.C. § 281. *See Marchetti* v. *United States,* 390 U.S. 39, 49 (1968).

Thus, the critical issue before the Court is whether the plaintiff is *compelled* to complete DD Form 1357. The defendants admit that a failure to comply with the reporting requirements of DoD directive 5500.7 would probably constitute a violation of Article 92 of the Uniform Code of Military Justice, 10 U.S.C. § 892. They assert, however, two reasons why the plaintiff is not compelled to complete DD Form 1357 by the threat of court martial under 10 U.S.C. § 892.

First, they argue that it is "uncertain" whether failure to complete the required form would be an offense with sufficient "service connection" to permit prosecution by court martial under the standards articulated by the Supreme Court in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), and *Relford* v. *Commandant,* 407 U.S. 355 (1971). Whether or not prosecution is certain to follow is, however, clearly not the relevant inquiry in determining compulsion for purposes of the privilege against self-incrimination. A similar argument was proffered by the Government in

Albertson v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), but the Court emphatically rejected it:

> Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so.

382 U.S. at 75-76. On the basis of *Albertson,* this Court finds defendants' first argument to be entirely without merit.

Defendants' second argument is that plaintiff is not compelled to complete DD Form 1357, since he can at any time submit his resignation as a regular retired Naval officer and thus avoid complying with DoD Directive 5500.7. It is clear, of course, that in doing so, plaintiff would have to sacrifice substantial benefits, both pecuniary and otherwise, as a "price" for asserting his privilege against self-incrimination. This Court must thus consider whether the exaction of this price is equivalent to compulsion for the purpose of the fifth amendment. *See generally* McKay, *Self-Incrimination and the New Privacy,* 1967 *Sup. Ct. Rev.* 193, 198-204; Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 *Mich. L. Rev.* 525, 539-43 (1976).

In *Spevack* v. *Klein,* 385 U.S. 511 (1967), the Supreme Court held that it was impermissible to disbar an attorney on the sole ground that he had asserted his privilege

against self-incrimination and refused to testify at a judicial inquiry. The Court stated that the fifth amendment protects "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence." 385 U.S. at 514, *quoting Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964). The Court emphasized that the concept of "penalty' is not restricted to fine or imprisonment. It means . . . that the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" 385 U.S. at 515. In *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973), the Court continued its development of this concept. *Lefkowitz* involved a challenge by two architects to a New York statute which required public contracts to provide that if a contractor refused either to waive immunity or to answer questions when called to testify concerning his contracts with the State, he would be disqualified for five years from further transactions with the State and his existing contracts could be cancelled. The Court concluded that these penalties were impermissibly severe and thus equivalent to compulsion:

> The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for testimony without waiver device. A waiver secured under threat of substantial economic sanction cannot be termed voluntary.

414 U.S. at 83-84.

This Court concludes that *Lefkowitz* controls the present case. While it is impossible to compare accurately the degree of compulsion inherent in two different penalties this Court is of the firm opinion that the plaintiff in the present case would, by resigning his commission, incur no less a penalty for the exercise of his privilege against self-incrimination than did the plaintiff-architects in *Lefkowitz.*

On the basis of this conclusion, and since it appears that no adequate guarantee of immunity has been offered to the

plaintiff, *see Lefkowitz, supra,* at 84-85, the Court holds that the plaintiff is presently subject to compulsion in violation of his fifth amendment privilege against self-incrimination.

Accordingly, the Court will enter an order of even date herewith granting plaintiff's motion for summary judgment, denying defendants' motion for summary judgment, and enjoining the Secretary of Defense and the Secretary of the Navy, their officers, agents, employees, and attorneys from requiring the plaintiff to comply with Department of Defense Directive 5500.7 insofar as that directive requires the plaintiff to submit information concerning his private employment which may tend to incriminate him, specifically as to violations of 18 U.S.C. § 281.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

ORDER

Filed August 26, 1976

In accordance with the Memorandum Opinion issued of even date herewith in this case, it is, by the Court, this 26th day of August, 1976,

ORDERED, that plaintiff's motion for summary judgment is granted; and it is

FURTHER ORDERED, that defendants' motion for summary judgment is denied; and it is

FURTHER ORDERED, that the Secretary of Defense and the Secretary of the Navy, their officers, agents, employees, and attorneys be, and the same hereby are, enjoined from requiring the plaintiff, Henry C. Field, Jr., to comply with Department of Defense Directive 5500.7 insofar as that directive requires the plaintiff to submit information concerning his private employment which may tend to incriminate him, specifically as to violations of 18 U.S.C. § 281.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

ORDER

Filed November 12, 1976

This case is before the Court on plaintiff's motion for reconsideration. In its Memorandum Opinion of August 26, 1976, this Court granted summary judgment for the plaintiff on his claim that Department of Defense Directive 5500.7 and DD Form 1357 violated his privilege against self-incrimination. At that time, the Court enjoined the defendants, their officers, agents, and employees, and attorneys from requiring the plaintiff to complete the form in issue insofar as the information requested may tend to incriminate him. In so ruling on plaintiff's fifth amendment claim, the Court specifically noted that it felt that it was not necessary to address plaintiff's other claims, including his claim that DOD Directive 5500.7 and DD Form 1357 violated the Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V., 1975).

Plaintiff's motion for reconsideration, filed on September 9, 1976, asks the Court to reconsider its decision not to rule on Plaintiff's Privacy Act claim and asks the Court to grant plaintiff's motion for Summary Judgment on that issue.

Although plaintiff's motion for reconsideration was filed over five weeks ago, defendants have not responded. The Court notes that this is not the first such delay by the defendants: Their opposition (in the form of a cross-motion for summary judgment) to plaintiff's June 23, 1976, motion for summary judgment was not filed until August 6, 1976.

In view of this consistent failure of the defendants to abide by the time limits established by the rules of this court, the Court concludes that defendants are not interested in defending against plaintiff's Privacy Act claim. Accordingly, in the interests of justice and pursuant to Rule 1-9(d) of the Rules of the United States District Court for the District of Columbia, the Court will treat plaintiff's motion for reconsideration and for summary judgment on his Privacy Act claim as conceded and will grant plaintiff the injunctive relief that he requests.

Insofar as plaintiff seeks damages and attorneys' fees pursuant to 5 U.S.C. § 552a (g)(4), however, the Court will not grant plaintiff's motion since the question of whether agency action was "intentional or willful" is not appropriately resolved on a motion for summary judgment. Thus, the Court will allow plaintiff ten (10) days in which to request an evidentiary hearing on this question if he desires to pursue this claim.

In accordance with the foregoing, it is, by the Court, this 11th day of November, 1976,

ORDERED, that the Secretary of Defense and the Secretary of the Navy, their officers, agents, employees, and attorneys be, and the same hereby are, permanently enjoined from requiring plaintiff to submit DD Form 1357; and it is

FURTHER ORDERED, that the Secretary of Defense and the Secretary of the Navy, their officers, agents, employees and attorneys be, and the same hereby are, permanently enjoined from taking any adverse action against the plaintiff for his refusal or failure to submit DD Form 1357; and it is

FURTHER ORDERED, that plaintiff shall inform the Court and defendants within ten (10) days of the date of this Order whether plaintiff desires an evidentiary hearing on whether damages and attorneys' fees should be awarded pursuant to 5 U.S.C. § 552(g)(4).

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., Defendants.

ORDER

Filed June 17, 1977

On November 12, 1976, pursuant to Rule 1-9(d) of the Rules of the United States District Court for the District of Columbia and in the interests of justice, this Court treated as conceded plaintiff's claim that DOD Directive 5500.7 and DD Form 1357 violated the Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V 1975). Accordingly, the Court granted plaintiff the injunctive relief he sought. The Court, however, refused at that time to grant plaintiff the damages and attorneys' fees he sought pursuant to 5 U.S.C. § 552a(g)(4), which authorizes such relief only if the Court determines "that the agency acted in a manner which was intentional or willful," because the Court concluded that the determination of whether the defendants' violation was "intentional or willful" was not appropriately resolved on a motion for summary judgment.

The case is now, therefore, before the Court for determination of the single, narrow question of whether the defendants intentionally or willfully violated the Privacy Act of 1974. In order to develop a proper factual predicate for this determination, the Court conducted an evidentiary hearing on Thursday, June 2, 1977.

Upon consideration of the testimony of the witnesses for the respective parties at the evidentiary hearing, and taking into account their credibility, and upon examination

of all the documentary exhibits introduced into evidence at said hearing, and upon consideration of the pre-hearing stipulations agreed to by the respective parties, the arguments of counsel in open court, and the entire record herein, the Court concludes that plaintiff has failed to introduce any evidence that any actions of the defendants or any of their agents were in willful or intentional disregard of the rights of plaintiff (or anyone else) under the Privacy Act. Nor has plaintiff introduced any evidence that would support an inference of such willful or intentional disregard of plaintiff's Privacy Act rights. Rather, the evidence of record clearly demonstrates that defendants and their agents made good faith attempts to comply with both the letter and the spirit of the Privacy Act at all times from its effective date to the present. Accordingly, the Court must conclude that plaintiff is not entitled to any damages or attorneys' fees pursuant to 5 U.S.C. § 552a(g)(4), and the Court will therefore dany plaintiff's application for damages and attorneys' fees.*

In accordance with the foregoing, it is, by the Court, this 17th day of June, 1977,

ORDERED, that plaintiff's application for damages and attorneys' fees be, and the same hereby is, denied.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

---

* The Court notes that even were it authorized in the absence of a finding of an "intentional or willful" violation to grant plaintiff attorneys' fees pursuant to 5 U.S.C. § 552a(a)(4), the Court would be unable to grant such attorneys' fees on the basis of the present record since plaintiff has failed to submit any testimony or affidavit as to the reasonable amount of such fees.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1590

HENRY C. FIELD, JR., *Plaintiff*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

ORDER

Filed November 30, 1977

Upon consideration of plaintiff's motion to require the defendants to show cause, and it appearing to the Court that plaintiff's motion and accompanying points and authorities fail to state any ground for the contempt order plaintiff seeks, it is, by the Court, this 29th day of November, 1977.

ORDERED, that the plaintiff's motion to require the defendants to show cause be, and the same hereby is, denied.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-735

JOSEPH E. HOKER, *Plaintiff*,

v.

HAROLD BROWN, *Defendant*.

MEMORANDUM AND ORDER

Filed January 18, 1978

Plaintiff, a retired naval officer, seeks declaratory and injunctive relief from defendant's Department of Defense (DOD) Directive 5500.7 which, through use of DD Form 1357 (Appended), solicits information concerning plaintiff's present employment activities. In seeking this relief, plaintiff asserts the DOD Directive 1357 violates (1) his Fifth Amendment privilege against self-incrimination, (2) privilege against self-incrimination guaranteed under the Uniform Code of Military Justice, 10 U.S.C. § 831, and (3) the Privacy Act of 1974, 5 U.S.C. § 552a.

Presently before the Court are (1) plaintiff's Motion to Maintain a Class Action, (2) plaintiff's Motion to Strike the Answer and Grant Judgment by Default, or in the Alternative, Summary Judgment, (3) plaintiff's Motion for Judgment on the Pleadings and (4) defendant's Cross Motion for Summary Judgment. The Court finds that no material facts are in dispute, and accordingly considers the case on the cross motions for summary judgment.

I. Background

The DOD began soliciting information on the employment activities of retired officers through the use of the original D.D. Form 1357[1] (old form) on May 1, 1963.

[1] Complaint, Exhibit 2.

Following enactment of the Privacy Act of 1974, the policy and practice of the DOD was to furnish a Privacy Act Statement with each copy of the old form that was distributed. This Statement[2] listed the statutory authority for the solicitation of the information; the principal purpose for which the information was intended to be used; the routine uses to be made of the information; and whether disclosure was voluntary or mandatory, and the effects upon the individual for failure to disclose.

The "Disclosure" section of the Statement read as follows:

> Disclosure is mandatory. Refusal to provide the information will result in inquiry into the individual's entitlement to receive retirement pay and notification to the Department of Justice for other appropriate action.

The use of old form 1357 was attacked in *Field* v. *Schlesinger*, (C.A. 74-1590 D.D.C.) and following the decision in *Field*, Form 1357 was revised (new form). The new form is the subject of attack in this case. Since the issues in this case track those in *Field* we briefly review the *Field* case for background.

As indicated in the "Disclosure" section of the Privacy Act Statement which accompanied the Old Form, *supra*, disclosure of the requested information was mandatory. Thus a retired officer was confronted with the option of filing the form and possibly having the information therein used against him in a criminal prosecution under 18 U.S.C. § 218[3] or not filing it and risking a court martial under 10 U.S.C. § 892.

[2] Answer, Exhibit B.

[3] Title 18 § 281 prohibits any retired officer, under threat of of fine or imprisonment, or both, from "represent[ing] any person in the sale of anything to the Government through the Department in whose service he holds a retired status."

By order dated August 26, 1976, Judge Richey of this Court held that by requiring Field to submit the old D.D. Form 1357, defendant was violating Field's Fifth Amendment privilege against self-incrimination. Accordingly, he enjoined defendant from requiring plaintiff to comply further with DOD Directive 5500.7 "insofar as that directive requires the plaintiff to submit information concerning his private employment which may tend to incriminate him." In arriving at his decision, Judge Richey noted that "the critical issue before the Court is whether the plaintiff is *compelled* to complete D.D. Form 1357."[4] He found it unnecessary to reach plaintiff's Privacy Act claim.

By motion for reconsideration, plaintiff Field requested the Court to amend its August 26, 1976 order and to render the additional ruling that old DOD Directive 5500.7 and DD Form 1357 also violated the Privacy Act. Defendant failed to respond to this motion, and by order dated November 12, 1976 the Court treated Field's Motion for Reconsideration as conceded pursuant to Local Rule 1-9 (d) and expanded the August 26, 1976 injunction to enjoin defendant from taking any adverse action against plaintiff Field for his refusal or failure to submit D.D. Form 1357.

On January 19, 1977 defendant published a revised DOD Directive 5500.7[5] which included revised D.D. Form 1357 (new form) that became effective January 1, 1977.

On September 28, 1977 plaintiff Field filed a "Motion to Require the Defendants to Show Cause Why They Should not be Cited For Contempt of this Court and For Such Other Relief as the Court Deems Necessary and Just." The thrust of that motion was that the revised Directive and accompanying form continued to violate the Court Orders of August 26, 1976 and November 12, 1976. The

[4] Field v. Schlesinger, *supra*, at 2.

[5] 42 Fed. Reg. 3646; Answer, Exhibit A.

arguments raised in that motion are virtually indistinguishable from those raised in this action. On November 30, 1977, Judge Richey denied plaintiff Field's Motion, noting that "it failed to state any ground for the contempt order plaintiff seeks . . . ."

II. Present Case

A. *5th Amendment*

Implicit in Judge Richey's Order of November 30, 1977 is that defendant's revised DOD Directive 5500.7 and DD Form 1357 (new) violate neither the Fifth Amendment privilege against self-incrimination nor the Privacy Act. We concur in that view. As noted, *supra*, in determining the self-incrimination issue, the Court in *Field* deemed the critical issue to be whether plaintiff was *compelled* to complete D.D. Form 1357. The Disclosure section of the Privacy Act Statement contained on the face of the revised D.D. Form 1357 (new) specifically provides:

> Disclosure of the requested information is voluntary in the sense that no criminal penalties will follow from failure to file . . . If the information is not provided, further investigation will ensue which may lead to the withholding of retired pay and the referral of the matter to the Comptroller General of the United States or other Federal agencies."

It is clear that this section removes the compulsory aspect of the old form self-incriminatory in *Field*, and accordingly there is no longer compulsion violative of the 5th Amendment.

B. *Privacy Act*

As for the Privacy Act, the thrust of plaintiff's argument is that, in general, all four sections of the Privacy Act statement on the revised D.D. Form 1357 contravene

the Privacy Act and, in particular, that the provisions of the Privacy Act on which defendant relies as "authority" for its promulgation of the form do not in fact authorize the solicitation of the information requested and therefore contravene § 552a(e) of the Privacy Act. We disagree.

Section 552a(e)(1) says that an agency may maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute . . . ."

The statutory provisions in question are Title 37 U.S.C. 801(c) and Title 5 U.S.C. § 5532.

Title 37 U.S.C. 801(c) prohibits payments to retired officers within three years of their retirement if they engage in the sale of war materials to certain government agencies. Title 5 U.S.C. § 5532 provides for a reduction of retirement payments to retired officers who, after their retirement, are employed by the United States Government or the District of Columbia. Clearly the information solicited by Form 1357 is relevant to the subject matter of those statutes and is necessary to the accomplishment of their purposes.

We further note the desirability of defendant DOD's method of soliciting the information directly from plaintiff in that such method conforms with the § 552a(e)(2) requirement that an agency "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."

III.

Based on the foregoing conclusions, the Court will enter an order of even date granting defendant's Motion for Summary Judgment and denying the various motions of plaintiff currently pending.

/s/ H. F. Corcoran
Judge

Dated: January 18, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-735

JOSEPH E. HOKER, *Plaintiff*,

v.

HAROLD BROWN, *Defendant*.

ORDER

Filed January 18, 1978

In accordance with the Memorandum Opinion issued of even date herewith in this case, it is, by the Court, this 18th day of January, 1978

ORDERED, that plaintiff's (1) Motion to Maintain a Class Action, (2) Motion to Strike the Answer and Grant Judgment by Default, or in the Alternative Summary Judgment, (3) Motion for Judgment on the Pleadings are hereby denied; and it is

FURTHER ORDERED, that defendant's cross Motion for Summary Judgment is hereby granted.

/s/ H. F. CORCORAN
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-349

JAMES G. LITTLE, *Plaintiff*,

v.

W. GRAHAM CLAYTOR, JR., et al., *Defendants*.

MEMORANDUM AND ORDER

Filed May 15, 1978

I. Introduction

Plaintiff in this action is a retired regular officer of the United States Navy. He seeks (a) a declaration that 37 U.S.C. § 801(c) is unconstitutional; (b) declaratory and injunctive relief from defendant's Department of Defense (DOD) Directive 5500.7 which, through use of a D.D. Form 1357 solicits information concerning plaintiff's employment activities; (c) damages for alleged wilful and intentional violations of the Privacy Act of 1974, 5 U.S.C. § 552a, arising from defendant's use of D.D. Form 1357; and (d) an injunction prohibiting defendants use in any criminal or civil forfeiture proceeding of any information obtained by them through plaintiff's submission of D.D. Form 1357.

Presently before the Court are plaintiff's Motion for Summary Judgment and defendants' Motion for Judgment on the Pleadings, or, in the alternative, for Summary Judgment. The Court finds that no material facts are in dispute, and accordingly considers the case on the cross motions for summary judgment.

II. Background

Plaintiff retired as a regular officer of the United States Navy on October 1, 1973 and began drawing retirement

pay. Shortly after his retirement, plaintiff accepted employment with the Sperry Flight Systems (Sperry).

At that time, as an aid to its determination as to whether a retired officer who was employed by private business was engaging in activity prohibited by certain conflict of interest statutes [1] the Navy was using "original DOD Directive 5500.7" and "D.D. Form 1357 (old form)." [2] D.D. Form 1357 was designed to reveal (a) the name of the employer of the retired officer, (b) the type of equipment which was being sold by the employer to defense related agencies, (c) plaintiff's position with the employer, and (d) the duties related to that position. The return of D.D. Form 1357 by a retired employed officer was mandatory.[3]

On October 1, 1975 and again on October 22, 1975,[4] as required by DOD Directive 5500.7, plaintiff submitted D.D. Form 1357.

Following his October 1, 1975 submission, plaintiff received a letter from the Judge Advocate General (JAG) dated January 15, 1976,[5] which raised questions as to the legality of plaintiff's employment activities and requested more detailed information concerning them. The letter further indicated that disclosure of the requested information was voluntary, but that refusal to provide the information might necessitate resorting to other channels to obtain

---

[1] *See e.g.*, 18 U.S.C. §§ 281, 283; 37 U.S.C. § 801(c); 5 U.S.C. § 5532.

[2] Copies of the original directive and form are attached to plaintiff's Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief (P.M.) as Exhibits 1 and 2.

[3] *See* original Directive 5500.7 at XXII.

[4] The October 22, 1975 submission contained certain revisions. Copies of these forms are attached to P.M. as Exhibits 3 & 4.

[5] Exhibit 5 attached to P.M.

it and that if the information were disclosed it might be referred to other government agencies for possible use in administrative, criminal or civil proceedings.

Plaintiff responded to the JAG letter on January 20, 1976, by sending JAG a copy of the D.D. Form 1357 which he had previously submitted on October 22, 1975. JAG in turn responded on January 28, 1976 requesting still more detail concerning plaintiff's employment.[6]

Plaintiff terminated his employment with Sperry on March 20, 1976. Nevertheless on February 4, 1977, the JAG addressed a letter to the Commander of the Navy Accounting and Finance Center [7] in which he expressed the opinion that plaintiff had violated 37 U.S.C. § 801(c) throughout his employment with Sperry. The letter indicated that the opinion was based, in part, on plaintiff's D.D. Form 1357 disclosures.[8] However, on March 14, 1977—in apparent conflict with JAG advice to Navy Accounting—plaintiff's counsel was notified by the United States Attorney that the JAG had reviewed plaintiff's D.D. Forms 1357 and had determined that the information contained therein did *not* justify the conclusion that plaintiff had violated 37 U.S.C. § 801(c).[9]

On March 28, 1977, defendant submitted the affidavit of Captain H. H. Arnold, Deputy Commander of the Navy

---

[6] Exhibit 8 attached to P.M.

[7] Exhibit 9 attached to P.M. A copy of this letter was sent to plaintiff.

[8] The opinion was also based on the results of an investigation conducted by the Naval Investigative Service. *See* Exhibit 15 attached to Plaintiff's Opposition to Motion to Dismiss and Cross-Motion for Summary Judgment. This investigation was initiated by JAG after receiving plaintiff's D.D. Form 1357.

[9] Plaintiff's Motion to Amend Complaint to Maintain Class Action at 1.

Accounting and Finance Center.[10] In his affidavit, Captain Arnold indicated: (a) that plaintiff's case and the JAG's recommendation with respect to it were under review by the Office of Counsel of the Comptroller of the Navy [11] and (b) that the Comptroller of the Navy was free to accept or reject the JAG's legal opinion regarding plaintiff's employment.[12]

Finally on April 18, 1978, defendant filed two documents with the Court. The first was a memorandum dated March 20, 1978, in which the Counsel of the Office of the Navy Comptroller indicated his view that there was insufficient evidence to support a finding that plaintiff was employed in violation of 37 U.S.C. § 801(c). The second document was a letter from the Assistant Comptroller, Office of the Navy Comptroller to plaintiff dated April 12, 1978, indicating that the Comptroller had completed his review of plaintiff's case and that based on the available information he was adopting the opinion of his counsel in finding insufficient evidence to support a § 801(c) violation against plaintiff.

Notwithstanding these "no action" statements by Navy personnel, the plaintiff seeks to pursue the remedies hereinbefore noted.

III. The Challenge to the Constitutionality of 37 U.S.C. § 801(c)

Section 801(c) of Title 37 reads as follows:

> (c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular

[10] Exhibit A attached to defendants' Motion to Dismiss.

[11] *Id.* at ¶ 3.

[12] *Id.*

> Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to any agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

Plaintiff asserts this provision is unconstitutional in that: (a) it is a Bill of Attainder; (b) it places an unreasonable constraint on plaintiff's right to choose the manner in which he earns a living in violation of the Fifth Amendment of the Constitution; (c) it is unconstitutionally vague as to what conduct it proscribes; (d) it imposes a forfeiture of property without Due Process; (e) it imposes an excessive fine in violation of the Eighth Amendment to the Constitution, and (f) it unlawfully discriminates between Reserve and Regular retired officers.

At the outset, we are confronted with the issue of the justiciability of plaintiff's constitutional challenge.

One aspect of this issue is:

> The established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action *he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action.*[13] (emphasis supplied)

[13] Laird v. Tatum, 408 U.S. 1, 13 (1972) citing *Ex parte* Levitt, 302 U.S. 633, 634 (1937). In further articulating this principle, the Court in *Laird* later noted that plaintiff must present "a claim of specific present objective harm or a threat of specific future harm." *Id.* at 14; *See* American Jewish Congress v. Vance, C.A. 76-1983 (D.C. Cir. April 21, 1978) at 10.

On this score the Supreme Court has said:

> For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. United Public Workers of America [C.I.O.] v. Mitchell, 330 U.S. 75, 89 (67 S.Ct. 556, 564, 91 L.Ed. 754) (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 [61 S.Ct. 510, 512, 85 L. Ed. 826] (1941).
>
> * * * * *
>
> The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance. In United Public Workers of America [C.I.O.] v. Mitchell, supra, at 89-90 [67 S. Ct. at 564], we said:
>
> > The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.[14]

[14] Golden v. Zwickler, 394 U.S. 103, 108, 110 (1969) cited in Davis v. Ichord, 143 U.S. App. D.C. 183, 442 F.2d 1207, 1214 (1970).

Underlying this principle is "a conception of the role of the judiciary in government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 72 (1961). The principle has thus lead to the determination "never the anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.*

In applying the principle to the facts underlying plaintiff's constitutional challenge, we find that he has failed to demonstrate how either § 801(c) or the Navy Comptroller's enforcement of it has either caused him direct injury or placed him in any immediate danger of sustaining such injury. He has not been fined or penalized nor has he forfeited anything. Though he has generally alleged that the statute limits job selection upon retirement, he has failed to demonstrate that he personally sustained any injury as a result of this limitation.[15] Nor do we deem the JAG's *advisory* opinion to the Navy Comptroller, which he apparently recinded one month later, as ever having placed plaintiff in *immediate* danger of sustaining direct injury through forfeiture of his retirement pay. That being so, we similarly dismiss plaintiff's contention that, despite the March 14, 1977 revised opinion of the JAG, and the Assistant Comptroller's letter of April 12, 1978 indicating insufficient evidence to support a § 801(c) violation against

[15] Plaintiff retired from the Navy on October 1, 1973. He began employment with Sperry on December 13, 1973. Thus, it does not appear, nor does plaintiff allege that 801(c) in any way limited his securing that job. As for any present or future jobs which plaintiff may occupy, he is now beyond the three year provision in the statute and accordingly any claim he would have with respect to the statute's unconstitutionally limiting his job selection is now moot. *Cf.* Board of Commissioners v. Jacobs, 420 U.S. 128 (1975).

plaintiff, he will forever remain in "immediate danger" of forfeiting three years of retirement pay.[16] "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Communist Party, supra* 367 U.S. at 71.[17]

In his challenge to the constitutionality of § 801(c) plaintiff also alludes to the present and future injury it causes to all retired regular officers. However, absent a showing of plaintiff's "personal stake in the outcome of the controversy," he may not rely on alleged injury to his fellow officers *Laird, supra,* 408 U.S. at 13-14 n.7.

In summary we view plaintiff's alleged present injury as ephemeral in nature and his prospect of future harm remote and speculative. Under such circumstances, we are constrained "both by the constitutional requirement of a justiciable case or controversy and from the limitations appropriate to the exercise of a court's equitable power" [18] to dismiss plaintiff's constitutional claims with respect to to 37 U.S.C. § 801(c).[19]

---

[16] Indeed, plaintiff himself admits ". . . it is apparent that the Navy quite probably will take no further action against Commander Little with regards to stopping his retired pay . . . ." Plaintiff's Motion to Clarify Record of Argument at 4.

[17] *Cf.* Du Bois Club v. Clark, 389 U.S. 309, 312 (1967) ("We have previously refused to decide the constitutionality of . . . provisions . . . because it was not clear that the act would be applied to the objecting parties.")

We find plaintiff's position not unlike petitioners' characterization (which the Court ultimately adopted) of respondents' status in *Laird* "Nothing has been done, that nothing is contemplated to be done and even if some action . . . against [respondents] were possibly foreseeable, such would not present a justiciable controversy." *Laird, supra,* 408 U.S. at 9.

[18] Finley v. Hampton, 154 U.S. App. D.C. 50, 473 F.2d 180, 184 (1972).

[19] Even were we to reach the merits (Ripon Society v. National Republican Party, 173 U.S. App. D.C. 350, 525 F.2d 567, 577 (1976)), we would find against plaintiff on his constitutional challenge to § 801(c). *See* Field v. Schlesinger, C.A. 74-1590 (D.D.C. April 7, 1976) at 1 & 2; Taussig v. McNamara, 219 F. Supp. 757 (D.D.C. 1963), *aff'd without opinion* D.C. Cir. April 6, 1964, *cert. denied,* 379 U.S. 834 (1964) (and see subsequent opinion on the merits in that case, C.A. No. 167-73, Youngdahl, J.). With respect to plaintiff's claim that § 801(c) discriminates against regular retired officers, *see* Alexander v. Fioto, 430 U.S. 634, 639-640 (1977); Puglisi v. United States, 564 F.2d 403 (Ct. Cl. 1977) *cert. denied* 46 U.S.L.W. 3645 (U.S. April 18, 1978). Regarding plaintiff's claim that 801(c) violates the Eighth Amendment's proscription against the imposition of excessive fines, *see* Ingraham v. Wright, 430 U.S. 651, 664-668 (1977) ("An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Id.* at 664).

IV. The Challenge to Revised DOD Directive 5500.7 and D.D. Form 1357 (new)

Reference has been made, *supra* at 1, to the "old" D.D. Form 1357 which plaintiff was required to, and did submit on October 1, 1975 and October 22, 1975. Subsequent to those submissions, Judge Richey of this Court held in *Field* v. *Schlesinger* C.A., 74-1590 that the "old form" violated Field's Fifth Amendment privilege against self-incrimination [20] as well as the Privacy Act of 1974, 5 U.S.C. § 552a.[21] (Privacy Act)

Thereafter on January 19, 1977, the Department of Defense published a revised DOD Directive 5500.7 [22] which provided for the use of a revised (new) D.D. Form 1357 [23] that became effective January 1, 1977. The revised form made submission voluntary rather than mandatory.

---

[20] *See* Order dated August 26, 1976.

[21] *See* Order dated November 12, 1976.

[22] 42 Fed. Reg. 3646.

[23] *See* Exhibit A attached to defendants' Motion for Judgment on the Pleadings, or In the Alternative, for Summary Judgment.

Plaintiff asserts that new D.D. Form 1357 continues to violate both the Fifth Amendment and the Privacy Act and that the decisions in *Field* put defendants here on notice of that fact. Accordingly he seeks declaratory and injunctive relief which would preclude defendant from "requiring him to submit the new form or from taking any adverse action against him for refusing or failing to submit it."

In *Hoker* v. *Brown,* C.A. 77-735 (D.D.C. January 18, 1978) we had occasion to consider the identical Fifth Amendment and Privacy Act claims against the new D.D. Form 1357 which plaintiff raises here. *Hoker* held that by revising D.D. Form 1357 to make its submission voluntary, defendant had eliminated its self-incriminatory nature found objectionable in *Field.* It further held that the form did not solicit information in violation of the Privacy Act.

We have found nothing in plaintiff's arguments which would cause us to alter our holdings in *Hoker.* Accordingly, plaintiff's prayer for declaratory and injunctive relief with respect to the new D.D. Form 1357 should be, and the same hereby is denied.

V. The Damage Claims Under the Privacy Act Through Use of D.D. Form 1357 (old)

To put these claims in proper perspective it is necessary to review prior practices of the DOD and prior proceedings in this District Court dealing with the rights and obligations of retired officers under the various conflict of interest statutes and the DOD directives.

The DOD began soliciting information as to the employment activities of retired officers on May 1, 1963 through the use of the old D.D. Form 1357. Following enactment of the Privacy Act of 1974, the policy and practice of the

DOD was to furnish a Privacy Act Statement [24] with each copy of the old form 1357 that was distributed.

As the disclosure section of the Statement indicates, plaintiff's disclosure of the information sought was mandatory.

Accordingly, a retired officer was confronted with the option of filing the form and possibly having the information therein used against him in a criminal prosecution under 18 U.S.C. §281 [25] or not filing it and risking a court martial under 10 U.S.C. § 892.

---

[24] The Privacy Act requires that such a statement spell out the statutory authority for the solicitation of the information, the principal purpose for which the information is intended to be used, the routine uses to be made of the information, whether disclosure is voluntary or mandatory, and the effects upon the individual for failure to disclose (5 U.S.C. § 552a(e)(3)).

The DOD's Privacy Act Statement read as follows:

DD FORM 1357 (STATEMENT OF EMPLOYMENT)—PRIVACY ACT STATEMENT

1. AUTHORITY: 44 U.S.C. Article 3101; 5 U.S.C. Article 301; DOD Dir. 5500.7, SECNAVINST 5370.2F.

2. PRINCIPAL PURPOSE(S): Information is required to be submitted by retired Regular Navy and Marine Corps officers to enable Department of the Navy officials to monitor compliance with laws providing civil or criminal sanctions for engaging in certain proscribed post-retirement employment activities.

3. ROUTINE USES: Information provided in the form may be furnished to other naval and DOD components; the U.S. General Accounting Office; the Civil Service Commission; the Department of Justice; the Department of Treasury; and other Federal agencies as appropriate for review, investigation, administrative action, criminal prosecution, or civil litigation; and to Congress.

4. DISCLOSURE MANDATORY/VOLUNTARY, CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is mandatory. Refusal to provide the information will result in inquiry into the individual's entitlement to receive retirement pay and notification to the Department of Justice for other appropriate action. 4ND NAVFINCEN 1800/24 (11-75)

[25] Title 18 § 281 prohibits any retired officer, under threat of fine or imprisonment, or both, from "represent[ing] any person

This situation was the subject of attack in *Field* v. *Schlesinger, supra* which proceeded on Fifth Amendment and Privacy Act grounds.

In a Memorandum Opinion dated August 26, 1976, Judge Richey held that by requiring Field to submit the old D.D. Form 1357, defendant was violating Field's Fifth Amendment privilege against self-incrimination. Accordingly, he enjoined defendant from requiring plaintiff to comply further with DOD Directive 5500.7 "insofar as that directive requires the plaintiff to submit information concerning his private employment which may tend to incriminate him." [26] In arriving at his decision, Judge Ritchey noted that "the critical issue before the Court is whether the plaintiff is *compelled* to complete D.D. Form 1357." [27] He found it unnecessary to reach plaintiff's Privacy Act claim.

By motion for reconsideration, plaintiff Field requested the Court to amend its August 26, 1976 order and to render the additional ruling that old DOD Directive 5500.7 and DD Form 1357 also violated the Privacy Act. The defendant failed to respond to this motion, and by order dated November 12, 1976 Judge Richey treated Field's Motion for Reconsideration as conceded pursuant to Local Rule 1-9(d). Accordingly, the terms of the August 26, 1976 injunction, as originally issued, which merely precluded defendant from using old D.D. Form 1357 to secure incriminating information were expanded to preclude defendant from taking any adverse action against Field for his refusal or failure to submit the old form.

Thereafter, as noted in Part IV *supra*, the Department of Defense published a revised directive 5500.7 and a re-

---

in the sale of anything to the Government through the Department in whose service he holds a retired status."

[26] Order attached to Memorandum Opinion of August 26, 1976.

[27] Field v. Schlesinger, *supra* at 2.

vised Form 1357 (new form) which became effective January 1, 1977.

Plaintiff asserts that even if defendants' new D.D. Form 1357 does not violate the Privacy Act, their old form D.D. Form 1357, which was submitted by plaintiff on October 1, 1975 and again on October 22, 1975 did violate the Privacy Act and that defendants' reliance on that information in continuing its investigation of plaintiff after Judge Richey's Order of November 12, 1976 in *Field* constituted an intentional or wilful violation of the Privacy Act which entitles plaintiff to damages and attorney's fees 5 U.S.C. § 552a(g)(4).

To support his premise, plaintiff relies on Judge Richey's Order of November 12, 1976 in *Field*. However, as noted *supra*, the Government did not challenge Field's Privacy Act claim and the Court deemed it conceded pursuant to Local Rule 1-9(d). Accordingly we find the November 12, 1976 Order of limited precedential value and, since defendants do challenge plaintiff's Privacy Act claims in this suit, we move to consider the merits of that challenge.

In substance plaintiff claims that the old D.D. Form 1357 violated the Privacy Act in that defendants did not comply with § 552a(e)(1) which requires that in maintaining a system of records defendants may retain:

> only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive Order of the President.

It is plaintiff's claim that the retained information is neither relevant or necessary "to accomplish a purpose of the agency required to be accomplished by statute or by Executive Order." We disagree.

In their Privacy Act Statement which accompanied the old D.D. Form 1357, defendants cited *inter alia* to 44 U.S.C.

§ 3101 and 5 U.S.C. § 301 as authority for their soliciting Section 3101 of Title 44 authorizes *inter alia* the head of each Federal agency to: "make and preserve records . . . designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly effected by the agency's activities." And Section 301 of Title 5 authorizes the head of an Executive or military department to "prescribe regulations for the government of his department, the conduct of its employees; the distribution and performance of its business and the custody, use, and preservation of its records . . . ." Clearly the information solicited on the old form was relevant to the subject matter of those statutes and was necessary to the accomplishment of their purposes. Accordingly, we find defendants did not violate the Privacy Act in soliciting information under the old form and that the damage claim accordingly must fail.

VI. The Self-Incrimination Claim

Though we have no difficulty in finding that defendants were authorized to request the information sought by the old form,[28] we concur in Judge Richey's August 26, 1976 holding in *Field* that in *compelling* plaintiff to chose between the Scylla of a possible court martial under 10 U.S.C. § 892 for failure to submit the old form and the Charybdis of supplying information on the form which might lead to criminal prosecution under 18 U.S.C. § 281 and forfeiture of retirement pay under 37 U.S.C. § 801(c), defendant violated plaintiff's Fifth Amendment privilege against self-incrimination.[29] Accordingly we enjoin the Secretary of

[28] *See Communist Party, supra* 367 U.S. at 108. ("Nevertheless, it is not and has never been the law that the privilege [against self-incrimination disallows the asking of potentially incriminatory questions . . . .")

[29] While we recognize that it is possible for a person to waive his privilege against self-incrimination if it is not asserted in a timely fashion, *see Communist Party, supra* 367 U.S. at 107-108, under the circumstances presented to us here, we do not deem plaintiff, at the time he submitted the old forms, to have exercised such waiver "voluntarily, knowingly, and intelligently." *Cf.* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

the Navy, the Secretary of Defense and their officers, agents, employees and attorneys from using in any criminal or civil proceeding against plaintiff any information contained in the D.D. Form 1357 submitted by him on October 1, 1975 or October 22, 1975.

VII. Conclusion

Except as provided in Section VI hereof, plaintiff's Motion for Summary Judgment and Other Relief as the Court Deems Proper should be and the same hereby is denied. In all other respects, defendants' Motion for Summary Judgments should be, and the same hereby is granted.

It is so ORDERED this 15th day of May, 1978.

/s/ H. F. CORCORAN
Judge

APPENDIX B

Chapter 15.—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

SEC.

281.[1] Compensation to Members of Congress, officers, and others in matters affecting the Government.

282.[1] Practice in Court of Claims by Members of Congress.

283.[1] Officers or employees interested in claims against the Government.

284.[1] Disqualifications of former officers and employees in matters connected with former duties.

* * * * * * * * * *

AMENDMENTS

1966—Pub. L. 89-554, § 3(a), Sept. 6, 1966, 80 Stat. 608, added item 292.

§§ 281 to 284. Repealed. Pub. L. 87-849, § 2, Oct. 23, 1962, 76 Stat. 1126.

Section 281, acts June 25, 1948, ch. 645, 62 Stat. 697; May 24, 1949, ch. 139 § 6, 63 Stat. 90, related to compensation to Members of Congress, officers and others in matters affecting the government.

Section 282, act June 25, 1948, ch. 645, 62 Stat. 697, related to practice in Court of Claims by members of Congress.

Section 283, acts June 25, 1948, ch. 645, 62 Stat. 697; June 28, 1949, ch. 268, § 2(b), 63 Stat. 280, related to officers or employees interested in claims against the government.

Section 284, acts June 25, 1948, ch. 645, 62 Stat. 698; May 24, 1949, ch. 139, § 7, 63 Stat. 90, related to disqualifications of former officers and employees in matters connected with former duties.

---

[1] Sections repealed without amending analysis to reflect such appeal.

Such sections 281, 282, 283 and 284 have been supplanted by sections 203, 204, 205 and 207 of this title, respectively.

EFFECTIVE DATE OF REPEAL

Repeal of sections effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87-849, set out as a note under section 201 of this title.

EXEMPTIONS

Sections 2 of Pub. L. 87-849 provided in part that: "All exemptions from the provisions of sections 281, 282, 283, 284, 434, or 1914 of title 18 of the United States Code heretofore created or authorized by statute which are in force on the effective date of this Act [see Effective Date note under section 201 of this title] shall, on and after that date, be deemed to be exemptions from sections 203, 204, 205, 207, 208, or 209, respectively, of title 18 of the United States Code except to the extent that they affect officers or employees of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, as to whom they are no longer applicable."

EXCEPTIONS OF RETIRED OFFICERS OF THE ARMED FORCES

The repeal of sections 281 and 283 by Pub. L. 87-849 was a limited repeal only, in that, under section 2 of Pub. L. 87-849, such sections would continue to apply to retired officers of the Armed Forces of the United States. For purposes of such limited applicability, sections 281 and 283 are set out as follows:

"§281. Compensation to Members of Congress, officers and others in matters affecting the Government:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or

employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in which service he holds a retired status.

"This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

* * * * * * * * * *

37 U.S.C. 801c

Chapter 15.—PROHIBITIONS AND PENALTIES

§ 801. Restriction on payment to certain officers

* * * * * * * * * *

(c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials

to an agency of the Department of Defense, the Coast Guard, the Environmental Sciences Administration, or the Public Health Service. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 485; Pub.L. 89-718, §§ 49(a)(1), 68, Nov. 2, 1966, 80 Stat. 1121, 1123.

Section 1309 of Act Aug. 7, 1953, c. 340, ch. XIII, Title I, 67 Stat. 437, from which subsection (c) of this section is derived, was amended by Pub. 87-777, § 2 Oct. 9, 1962, 76 Stat. 777, to extend the period during which the restriction on retired pay to certain retired officers engaged in selling war materials to the Government is applicable from two to three years after retirement.

* * * * * * * * * *

5 U.S.C. 552a

Short Title. Section 1 of Pub.L. 93-579 provided: "That this Act [enacting this section and provisions set out as notes under this section] may be cited as the 'Privacy Act of 1974'."

Congressional Findings and Statement of Purpose. Section 2 of Pub.L. 93-579 provided that:

"(a) The Congress finds that—

"(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

"(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;

"(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

"(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

"(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use and dissemination of information by such agencies.

"(b) The purpose of this Act [enacting this section and notes set out under this section] is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law to—

"(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

"(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

"(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

"(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

"(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need

for such exemption as has been determined by specific statutory authority; and

"(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

• • • • • • • • • • •

§ 552a. Records maintained on individuals

(a) *Definitions.*—For purposes of this section—

(3) the term "maintain" includes maintain, collect, use or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

• • • • • • • • • • •

(e) *Agency requirements.*—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations

about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system; (etc.)

* * * * * * * * * * *

(g)(1) *Civil remedies.*—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and

completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in any such a way as to have an adverse effect on an individual.

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

• • • • • • • • • • •

(i)(1) *Criminal penalties.*—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

• • • • • • • • • • •

SECTION 303

CIVIL REMEDIES

Section 303 provides for civil judicial enforcement of the Act by persons affected by violations of the Act. In keeping with general legislative practice, this bill not only establishes certain administrative requirements and grants certain rights to citizens, but gives authority to the citizen to defend his rights by taking the initiative of court action. Such a right is doubly important since the revised bill gives no enforcement authority to the Commission.

Subsection 303(a). Gives a cause of action to a citizen aggrieved by a denial of access to his own file. Since access to a file is the key to insuring the citizen's right of accuracy, completeness, and relevancy, a denial of access affords the citizen the right to raise these issues in court. This would be the means by which a citizen could challenge any exemption from the requirements of sections 201 and 202

made pursuant to the procedures outlined in section 203. A person seeking access to a file which he has reason to believe is being maintained on him for the purposes of determining its accuracy and completeness, for example, or to take advantage of the rights afforded him under section 201, could raise the question of the propriety of the exemption which denies him access to his files. In deciding whether the citizen has a right to see his file or to learn whether the agency has a file on him, the court would of necessity have to decide the legitimacy of the agency's reasons for the denial of access, or refusal of an answer. The Committee intends that any citizen who is denied a right of access under the Act may have a cause of action, without the necessity of having to show that a decision has been made on the basis of it, and without having to show some further injury, such as loss of job or other benefit, that might stem from the denial of access. Since it is often exceedingly difficult for a citizen to learn of such consequences, or if he knows, to establish a "cause and effect" relationship between the information in his file and some subsequent damage to him, the Committee has decided that it would frustrate an individual's ability to assert his rights if he had to allege and prove use or such consequential harm. In order to state a cause of action, it should be enough that he be able to assert that the presumptive right of access granted him by the Act has been denied him.

Subsection 303(b). Affords the Attorney General and any aggrieved person authority to enforce the Act as against existing or threatened violations of the Act by seeking a Federal District Court injunction against such acts or practices. This subsection has a two-fold purpose. First, it gives the Attorney General the obligation to challenge in court any violation of the Act which might affect the public at large, but which does not yet affect any particular citizen sufficiently to give him constitutional standing to sue, or which may not be such as to induce a private person to endure the practical difficulties of litigation.

Second, the grant of a cause of action to any "aggrieved person" is designed to encourage the widest possible citizen enforcement through the judicial process. This is necessary, as mentioned, since the Act does not give any administrative body authority to ensure compliance with the Act. The Committee intends the use of the term "aggrieved person" to afford the widest possible standing consistent with the constitutional requirement of "case or controversy" in Article III, Sec. 2 of the Constitution. In this respect, the provision is designed, among other things, to supply certain deficiencies in standing and ripeness which the courts found in the *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973), *Laird* v. *Tatum* (408 U.S. 1 (1972), and *Stark* v. *Schultz,* 42 U.S.L.W. 4481 (Apr. 1, 1974)).

Subsection 303(c). Provides that any person found to have violated provisions of the Act or any rule, regulation, or order issued under it shall be liable to the aggrieved person for actual damages sustained by the individual, punitive damages where appropriate, and in case of successful action, the cost of the action, with reasonable attorney's fees to be determined by the court.

In addition to damages, the aggrieved person would receive the benefit of any other appropriate remedies, including injunctive or mandatory relief, which the court deems appropriate.

The final subsection makes clear that the Federal courts will have jurisdiction regardless of the fact that the amount claimed is less than $10,000.

Section 304

Jurisdiction of district courts

Subsection 304(a). Gives jurisdiction to the Federal courts to hear cases brought under section 303 and to examine information *in camera* to determine whether the in-

formation or any part of it may be withheld under any of the exemptions in section 203 of the Act. The agency has the burden of sustaining the legality of its actions. Venue would most likely be either in the plaintiff's jurisdiction, or in Washington, D.C., although other venue is possible. The section also ensures that the court will have the power to examine *in camera* any contested information necessary to a determination of the litigation, thus among other things, remedying the lack of reviewing power which the Supreme Court found in the *Mink* case. Since the burden of justifying the withholding of information is on the agency, this will enable the court to make a full *de novo* determination of the propriety of the grounds asserted by the government for keeping the information from the plaintiff. Such a provision is necessary in order to provide a full and complete hearing to the issues being litigated and to provide justice to the aggrieved individual.

Subsection 304(b). Provides that in any action to obtain judicial review of a decision to exempt any personal information from any provision of this Act, the Court may examine such information *in camera* to determine if all, or any part of it, is properly classified with respect to national defense, foreign policy, or law enforcement intelligence or investigative information and may be exempted from any provision of this Act. The burden is on the Federal agency to sustain any claim that such information may be so exempted.

APPENDIX C

Certification of Counsel

I, Joseph K. Taussig, Jr., counsel for Henry C. Field, Jr., James G. Little, and Joseph E. Hoker, et al, hereby certify that the following is true to my best knowledge and belief.

On January 17, 1980, I sent identical letters to the Secretary of the Navy, the Secretary of the Army, and the Secretary of the Navy, as shown in the letter following, to the Secretary of the Navy.

To date, I have received only the enclosures set forth.

As the correspondence indicates, these have not been the first of my efforts to obtain the information.

Insofar as the Secretary of the Navy is concerned, there has been no response, save the letter from Donald Carr, and a telephone call on March 12, 1980 from an individual identfying himself as Commander Alan Rudy, in JAGN's Office, apologizing for the lack of response, and assuring me that he would respond as soon as possible.

To the date of meeting the printing deadline for the petition for a Writ of Certiorari, March 24, 1980, I have heard nothing since.

/s/ Joseph K. Taussig, Jr.
Counsel for Petitioners

JOSEPH K. TAUSSIG, JR.
400 Ridgely Avenue
Annapolis, Maryland 21401

January 17, 1980

Secretary of the Navy
Room 4E686
The Pentagon
Washington, D.C. 21350

Dear Mr. Secretary:

Pursuant to the Freedom of Information Act 5 U.S.C. 552, I request the following information:

1. The location and recipient of DD Forms 1357, Statement of Employment, submitted by retired regular officers pursuant to DOD Directive 5500.7 and other directives.

2. The administrative procedures and subsequent communications which are sent to retired regular officers who fail, within thirty days of their retirement, or thereafter, to submit an initial DD Form 1357, as required by DOD Directive 5500.7.

3. The administrative procedures and subsequent communications which are sent to retired regular officers who are known to have changed their employment after submitting a DD Form 1357, and have not updated this Statement of Employment as required by DOD Directive 5500.7.

4. Copies, if any, of any communications sent to all retired regular officers of your Department addressing their obligation to submit DD Forms 1357, which have been promulgated since January 1, 1977.

5. Copies of the administrative procedures or instructions issued to officers, employees, agents, or attorneys of your Department with regards to:

A. The retention or destruction of DD Forms 1357 submitted prior to January 1, 1977.

B. The review and processing of DD Forms 1357 submitted prior to January 1, 1977 if these should now appear to indicate the retired regular officer may have violated 37 U.S.C. 801(c).

C. The review and processing of DD Forms 1357 submitted prior to January 1, 1977 if these should now appear to indicate that the retired regular officer has violated 18 U.S.C. 281, 18 U.S.C. 283, or 18 U.S.C. as set forth in DOD Directive 5500.7, or any other criminal statute.

D. The review and processing of DD Forms 1357 submitted after January 1, 1977 if these appear to indicate that the retired regular officer has violated 37 U.S.C. 801(c).

E. The review and processing of DD Forms 1357 submitted after January 1, 1977 if these appear to indicate that the retired officer has violated 18 U.S.C. 281, 18 U.S.C. 283, 18 U.S.C. 207 as set forth in DOD Directive 5500.7, or any other criminal statute.

6. The location of the custodian of DD Forms 1357 submitted prior to January 1, 1977 which do not indicate that there has been a violation of any statute. (i.e, where are these filed and the custodian of these files.)

7. The location of the custodian of DD Forms 1357 submitted after January 1, 1977 which do not indicate that there has been a violation of any statute.

I request these answers for both the Navy and Marine Corps if the procedures or answers are different between the two services.

This request is made in the public interest. However, if there are expenses involved in providing this information, I will pay these on your submission of a bill.

Very truly yours,

/s/ JOSEPH K. TAUSSIG, JR.
Joseph K. Taussig, Jr.

JKT/tcs

DEPARTMENT OF THE NAVY
Office of the Chief of Naval Operations
Washington, D.C. 20350

IN REPLY REFER TO
Ser 09B1F/513582
February 6, 1980

Mr. Joseph K. Taussig, Jr.
400 Ridgely Avenue
Annapolis, Maryland 21401

Dear Mr. Taussig:

Your letter of 17 January 1980, addressed to the Secretary of the Navy, has been referred to this office for a reply.

Any information this Department may have pertaining to the DD Form 1357, submitted by retired regular officers pursuant to DOD Directive 5500.7, would be under the Cognizance of the Judge Advocate General, Navy Department, Washington, D.C. 20370. Therefore, by copy of this letter and the forwarding of your request, that official is requested to reply directly to you.

Sincerely,

/s/ DONALD CARR
Donald Carr
FOIA Coordinator
By direction of
Chief of Naval Operations

DEPARTMENT OF THE AIR FORCE
Headquarters Air Force Accounting and Finance Center
Denver, Colorado 80279

22 February 1980

Reply to Attn. of: DAD/ C Price/370-7553

Subject: Request for Information (Your Ltr, 17 Jan. 1980)

To: Mr. Joseph K. Taussig, Jr.
208 Wardour Drive
Annapolis MD 21401

Dear Mr. Taussig

A copy of your letter of 17 Jan. 80 to the Secretary of the Air Force has been forwarded to this Center for a direct reply.

We have no additional information pertaining to your requests, other than that provided in our letters of 21 June 79, and 3 Oct. 79, copies of which are attached. We are sorry that we cannot be of further assistance.

Sincerely

/s/ ZELMA KING—for
E. L. BRANDON
Chief, Documentation Branch
Directorate of Resource Management

2 Atch

3 October 1979

RPTTS/D. Williams/320-7481

Request for Information—Your Letter, 28 August 79

Joseph K. Taussig, Jr.
400 Ridgely Avenue
Annapolis MD 21401

Dear Mr. Taussig

We have furnished you with a copy of RP DOI #13 on procedures concerning DD Form 1357 in accordance with your previous request dated 1 May 1979.

The following is in response to your current inquiry.

1. DD Form 1357's issued prior to 1 January 1977 are maintained in the member's records.

2. These forms will be used in the investigation for conflict of interest.

3. Forms are maintained as stated above.

4. We are not aware of any directives limiting the action to be taken pending outcome of the court cases you referred to in your letter.

5. Instructions to retirees concerning DD Form 1357's are contained in AFR 30-30 which the retiree receives upon retirement.

Sincerely,

/s/ Don Williams
[Illegible]

Attch
DD Fm 1357

DADF 21 June 1979

Request for Information (Your Ltr, 1 May 1979)

Joseph K. Taussig, Jr.
208 Wardour Drive
Annapolis MD 21401

Dear Mr. Taussig

Your letter was forwarded to us by HQ USAF/DADF.

We do not have a list of retirees who have lost their retired pay under 37 U.S.C. 801(c). As of this date no member has lost his pay under that law.

We are attaching a copy of our local procedure for processing DD Form 1357, Statement of Employment. The information given the retiree upon retirement is not available in this office. We suggest you contact the Air Force Manpower and Personnel Center, Randolph Air Force Base, Texas 78148 for that information.

We apologize for the delay in our reply. If we can assist you further, please contact us.

Sincerely

E. L. Brandon
Chief, Documentation Branch
Directorate of Resource Management

Atch
RP DOI 13

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Washington, D.C. 20330

September 18, 1979

DADF

Mr. Joseph K. Taussig, Jr.
400 Ridgely Avenue
Annapolis MD 21401

Dear Mr. Taussig

Your letter of August 28, 1979, addressed to The Honorable Harold Brown, Secretary of Defense, was received in this office for action on September 4, 1979.

We checked again offices within The Air Force Judge Advocate General's organization (AF/JA) and offices within Air Force Comptroller (AF/AC).

AF/JA informs us they are unaware of any internal instructions limiting adverse actions against retired regular officers pending the conclusion of certain cases in litigation.

Both AF/AC and AF/JA state that the information you seek must be obtained from the Air Force Accounting and Finance Center (HQ AFAFC/DADF), Denver CO 80279 since that organization is responsible for processing DD Form 1357. We have therefore transferred your letter to HQ AFAFC/DADF for their action and direct reply to you.

/s/ M. K. WARD
(Ms.) M. K. Ward
HQ USAF Freedom of
Information Manager

#542-79

DEPARTMENT OF THE ARMY

2 January 1980

SUBJECT: Statement of Employment

1. Reference our letter concerning the requirement for Regular Army officers and warrant officers to file DD Form 1357, Statement of Employment, within 30 days after retirement.

2. The required Statement of Employment has not yet been received from you. Please complete the inclosed DD Form 1357 and return it as soon as possible. The forms must be completed notwithstanding the fact that you may be self-employed or may not be employed at the present time.

3. Paragraph 4-2b, AR 600-50, Standards of Conduct for Department of the Army Personnel states as follows:

"Each retired Regular Army Officer will file a Statement of Employment, DD Form 1357, within 30 days after retirement and thereafter within 30 days after the information in the previous statement has ceased to be accurate. Statement of Employment, DD Form 1357, or inquiry relative thereto will be forwarded to: Commander, US Army Finance and Accounting Center, FINCM, Indianapolis, IN 46249. These Statements will be reviewed to assure compliance with applicable statutes and regulations."

4. Any questions concerning this requirement should be directed to the above address.

FOR THE COMMANDER:

1 Incl
as

DEPARTMENT OF THE ARMY

SUBJECT: Statement of Employment

1. On two previous occasions we furnished you DD Forms 1357, Statement of Employment, to complete and return to this Center. As of this date, we have not received your reply.

2. Submission of this form is required by DOD Directive 5500.7 and Army Regulation 600-50. Please complete the attached DD Form 1357 and return it to Director, Retired Pay Operations, Dept. 90, US Army Finnace and Accounting Center, Indianapolis, IN 46249.

3. Although disclosure of the information is voluntary, your continued failure to complete and return the DD Form 1357 will create serious doubt as to your eligibility to continue to receive retired pay. If the form is not received within 30 days of this correspondence, it will be necessary to suspend your retired pay.

1 Incl
as

Commanding

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, Va. 22332

IN REPLY REFER TO
JAG:122:ACR:kaj
Ser:12/14085
19 March 1980

Mr. Joseph K. Taussig, Jr.
400 Ridgely Avenue
Annapolis, Maryland 21401

Dear Mr. Taussig:

As you are aware, your 17 January 1980 Freedom of Information Act request to the Secretary of the Navy for information concerning Department of the Navy Procedures for the filing anl review of DD Form 1357 has been referred to this office for reply.

On 12 March 1980 CDR A.C. Rudy, Jr., JAGC, USN advised you by phone that the Office of the Judge Advocate General would provide you with copies of the applicable departmental-level regulations. Enclosed are copies of the Department of the Navy and Department of Defense regulations which have been in effect during the period 1967 to the present. (Enclosures 1-4). Enclosure 5 is a copy of the standard letter sent by the Chief of Naval Personnel to all retiring Regular Navy officers—the only communication concerning the obligation of retired Regular officers to submit DD Form 1357, which is sent automatically to all retired Regular Navy officers. Enclosure 6 is a copy of the Navy Department's *Reference Guide to Employment Activities of Retired Naval Personnel,* NAVSO P-1778 (Rev. 1-78), which, while not sent to each retiring Navy and Marine Corps officer, is made available at the local command level to each such officer for his review prior to retirement.

Paragraph 12 of the Navy Department's Standards of Conduct Instruction, SECNAVINST 5370.2G of 4 Aug. 1977, provides that the Navy and Marine Corps officials having direct cognizance over the procedures in question are the Comptroller of the Navy and the Commandant of the Marine Corps. Accordingly, by copy of this letter your request is referred to those officials regarding questions pertaining to matters of their cognizance.

Sincerely,

/s/ JAMES J. MCHUGH
James J. McHugh
Captain, JAGC, U. S. Navy
Assistant Judge Advocate General
(Civil Law)

HENRY C. FIELD
1304 Wren Place
VIRGINIA BEACH, VA. 23451

February 12, 1980

AFFIDAVIT

TO WHOM IT MAY CONCERN

Attachment "A" hereto is a certified copy of a letter from Metro Machine Corporation dated January 18, 1980 and signed by Mr. Richard A. Goldbach, president. This letter proposes to reassign Metro employee Henry C. Field, Jr. to his previously assigned contractual duties and requests the Navy Supervisor of Shipbuilding to express agreement or disagreement with this proposal.

Attachment "B" hereto is a certified copy of a letter from the Navy Supervisor of Shipbuilding dated February 8, 1980 in response to Attachment "A" which advises only that this matter has been referred to higher Navy Authority for legal review.

In a telephone conversation on January 25, 1980 Commander D. F. Suter, SC,USN, Contracts Officer of the Navy Supervisor of Shipbuilding, advised me that his office will continue to treat me as it has in the past, which is that they will not deal with me in any contractual manner.

/s/ HENRY C. FIELD, JR.
Henry C. Field, Jr.

City of Norfolk
State of Virginia

Subscribed and Sworn to me this
12th day of February, 1980.

/s/ ILLEGIBLE
Illegible
Notary Public

My Commission Expires November 13, 1981

METRO MACHINE CORPORATION
P.O. Box 1860—Norfolk, Virginia, 23501—(804) 543-6801

January 18, 1980

Supervisor of Shipbuilding
Conversion and Repair
P.O. Box 215
Portsmouth, VA 23705

Attention: Commander Suter, USN

Dear Commander Suter:

Based on the recommendations of and position taken by the Supervisor of Shipbuilding, Portsmouth, VA, Metro Machine Corporation revised the duties of its employee, Henry C. Field, Jr., and prohibited certain of his duties in relation to Navy contracts including negotiation of job order changes and the signing of various contractual documents such as job order modifications, price proposals, invoices, request for reimbursement, claims, responses to competitive IFB's and RFP's, etc. This action was taken in response to the Navy's position that Field, as a regular retired officer, would be in violation of 18 U.S.C. 281 in carrying out the execution of these duties and that Supships employees who conducted contractual matters with him would be in violation of the law.

In its decision of November 13, 1979 in case No. 76-1781, Henry C. Field, Jr. appellant v. Harold Brown, Secretary of Defense, et al., The United States Court of Appeals for the District of Columbia Circuit dismissed Field's complaint and remanded the case to the District Court to vacate its judgment and dismiss Field's case without prejudice. This action of the Court of Appeals was based on the written representation of the Department of Justice that it will not prosecute cases under 18 U.S.C. 281 due to the vagueness of the statute.

In view of the representation of the Department of Justice and this action of the Court of Appeals I desire, in all fairness, to restore Field to his previous duties. I therefore request your agreement that your office has no objection to Field's resuming negotiations of changes and signing contractual documents.

Your statement of agreement or disagreement is requested by January 25, 1980.

Very truly yours,

METRO MACHINE CORPORATION

/s/ RICHARD A. GOLDBACH
Richard A. Goldbach
President

CERTIFIED TO BE A TRUE COPY
/s/ HENRY C. FIELD, JR.
Henry C. Field, Jr.
February 12, 1980

RAG/ie

SHIP REPAIRS, OVERHAULS AND COVERSIONS

Attachment "A"

SUPERVISOR OF SHIPBUILDING, CONVERSION AND REPAIR, USN
P. O. Box 215
PORTSMOUTH, VIRGINIA 23705

In reply refer to:
4330
400/DFS/tgt
Ser 0313
8 Feb 1980

Metro Machine Corporation
Attention: Mr. Richard A. Goldbach
P. O. Box 1860
Norfolk, VA 23501

Subj: Standards of Conduct; Dealing with a Retired Regular Naval Officer

Ref: (a) Metro Machine Corporation letter of 18 January 1980

Gentlemen:

Receipt of your letter reference (a), is acknowledged.

Please be advised that this matter has been referred to higher Navy Authority for legal review. You will be advised of the Navy's position when this office is officially notified.

Very truly yours,

/s/ D. F. SUTER
D. F. Suter
CDR, SC, USN
Contracts Officer

CERTIFIED TO BE A TRUE COPY
/s/ HENRY C. FIELD, JR.
Henry C. Field, Jr.
February 12, 1980

Attachment "B"